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REPORTS
OF
CASES DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between March 30, and May 14, 1907.

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PERRY S. RADER,
REPORTER.
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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. JAMES B. GANTT, Chief Justice.
HON. GAVON D. BURGESS, Judge.
HON. LEROY B. VALLIANT, Judge.
HON. JAMES D. FOX, Judge.
HON. HENRY LAMM, Judge.
HON. WALLER W. GRAVES, Judge.
HON. ARCHELAUS M. WOODSON, Judge.

HERBERT S. HADLEY, Attorney-General.
JOHN R. GREEN, Clerk.
JOSEPH H. FINKS, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS.

DIVISION ONE.

HON. LEROY B. VALLIANT, Presiding Judge.

HON. HENRY LAMM, Judge.

HON. WALLER W. GRAVES, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

DIVISION TWO.

HON. JAMES D. FOX, Presiding Judge.

HON. JAMES B. GANTT, Judge.

HON. GAVON D. BURGESS, Judge.

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CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
OCTOBER TERM, 1906.

(Continued from Volume 202)

DICKEY v. PORTER et al., Appellants.

In Banc, March 30, 1907.

1. **TAXBILL: Assignment: Ownership.** Where defendants assert by way of new matter that plaintiff before the beginning of the suit assigned and delivered the taxbill sued on to a brokerage company, they are not in a position to insist on a general denial to the effect that he was never the owner of the taxbill, for if he assigned it he owned it, and an allegation that he assigned it is inconsistent with an assertion that he never owned it.
2. ———: ———: **Pledge: Real Party in Interest.** Where the owner of a taxbill has pledged it as collateral security for the payment of a note of less amount he owes a bank, he still has such an interest in it as entitles him to bring suit thereon to preserve and enforce the lien of the taxbill. Notwithstanding the pledge, the title does not pass to the pledgee, but still remains in the pledgor, subject to the pledgee's lien — just as in the case of a mortgage.
3. ———: ———: ———: ———: **Equity: Code.** The General Assembly, in creating the Code, and in providing for but one form of action, and in providing that that shall be prosecuted in the name of the real party in interest, in substance adopted the equity rule which had theretofore prevailed, that the assignee of an assigned instrument might sue in his own name, he being the real party in interest, and that the pledgor of a
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(1)

pledged instrument being one of the real parties in interest (and being especially interested, for instance, in preserving and enforcing the lien of the pledged special taxbill), should at least be one of the parties plaintiff.

4. ———: ———: ———: ———: **Defect of Parties: Not Raised by Answer.** It is competent for both the pledgor and pledgee to join in a suit to preserve and enforce the lien of a special taxbill, but if the suit is brought by the pledgor alone, and the defect of parties does not appear on the face of the petition, it can be raised only by answer.
5. ———: ———: ———: ———: **Payment.** If between the time the suit is brought by both the pledgor and pledgee and the trial, the debt, to secure which the pledged special taxbill was held by the pledgee as collateral security, is paid, the pledgee is no longer a necessary party to an action to enforce the lien of the special taxbill, or to recover a judgment thereon if the lien has expired, and if the attention of the court is called to that fact the name of the pledgee should be stricken out.
6. ———: ———: ———: ———: **Pledgee Alone: Trustee.** The pledgee of a lien (for instance, a special taxbill) may bring suit in his own name to enforce the lien, but the extent of his recovery for himself will be the amount of the debt the pledgor owes him, and he will be a trustee for the pledgor for the overplus. But that does not mean that the pledgor, where he is the real party in interest, may not also bring the suit either alone, or by joining with the pledgee as plaintiff.
7. ———: **Payment to Wrong Party.** Under the charter of Kansas City, the owners of abutting property against which a special taxbill has been issued in payment of a sewer, can avoid all danger of paying the amount of the taxbill to the wrong party by paying it to the city treasurer.
8. ———: **Signed by President of Board.** A taxbill is not void because the signature of the president of the board of public works was signed by an officer designated for that purpose as provided in the charter. A reasonable construction of the charter does not require the president of the board with his own hand to do all the clerical work of making out special taxbills, but when they are issued by authority of the board and signed by its president by the party specially authorized by the resolution of the board to sign the president's name, all the substantial requirements of the charter are complied with. Such method of signature is only a method to attest the taxbill in the name of the president; it is not delegating to a clerk or other party the power to apportion the costs and assess each lot with its share and issue taxbills therefor.

Dickey v. Porter.

9. ———: **Recitals: Total Area.** It is not essential that the taxbill show on its face every prerequisite step necessary to its validity. It is not void because it does not contain a recital of the total area of the lands subject to the assessment, or any affirmative or general statement that the lands described in the taxbill were charged according to the area of such tract of land.
10. ———: **Assignment of Contract and Sub-Letting.** There is a palpable difference between assigning moneys due under a contract and an assignment of the contract itself. The borrowing of money from plaintiff by the contractor, and securing him for the loan by a contract assigning to him the special taxbills to be issued, and the employment by plaintiff of a competent engineer to see that the contractor carries out his contract with the city, is not an assignment of the contract to plaintiff, nor a subletting to him of the work.
11. ———: **Usurious Contract: New Defense.** A defense to the special taxbill not raised in the trial court will not be considered on appeal. Whether or not the contract between plaintiff and the contractor, by which plaintiff advanced to the contractor money to carry on the work, was usurious, will not be considered on appeal, if that defense to the taxbill was not made in the trial court.
12. ———: **Thickness of Sewer Pipe: Specifications in Ordinance.** Where the ordinance provided that the work should conform to the plans and specifications then on file in the office of the board of public works, those plans and specifications were as much a part of the ordinance as if they had been set forth therein in detail; and as the ordinance itself provided that all sewers of twenty-one inches or less in interior diameter should be constructed of vitrified clay pipe, and all sewers two feet or more in interior diameter should be constructed of hard burned brick laid in hydraulic cement mortar, and as the specifications and contract on file with the board specifically described the thickness of the pipes, it is obvious the dimensions of the sewer pipe were not left to the discretion of the city engineer, and the taxbills are not therefore void. And especially should this be the holding where neither the answer nor the instructions made the point that the thickness of the sewer pipe was not sufficiently designated, and defendants contented themselves to raising that point only by an objection to the introduction of the ordinance in evidence.
13. ———: **Sewer: Masonry.** Where it is impossible, on account of the hills and character of clay, etc., to definitely state the amount of rubble masonry that will be required for carrying the sewers, and for courts and side protections, the taxbills

are not void because of a failure of the ordinance to prescribe the length and quality of masonry required. If the quantity exceeds the estimates, the most the property-owners can demand is a credit on the taxbills for the excess; but if the amount is in substantial compliance with the contract, ordinance and charter, not even that credit should be allowed.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

Elijah Robinson, Rozzelle, Vineyard & Thacher
and *R. H. Field* for appellants.

(1) On the facts, the right of foreclosure of the taxbill by suit was in the Pennsylvania Bank and not in Dickey, when this suit was begun, and for this reason the judgment must be reversed. *Meyers v. Water Co.*, 10 Cal. 579; *Wetmore v. San Francisco*, 44 Id. 294; *Fulton v. Swift*, 84 Ind. 490; *Reynolds v. Railroad*, 143 Id. 619; *Silleck v. Compress Co.*, 72 Miss. 1019; *Griswold v. American Ins. Co.*, 1 Mo. App. 100; and see these and other authorities cited and quoted in the argument of this point, *post*. (2) The special taxbill sued on is void and the finding and judgment should have been for defendants, as asked in the declaration of law asked by defendants, because this bill was not made out and certified by the president of the board of public works, nor in his name by any person or persons by the board of public works thereunto specially authorized. *Kansas City Charter*, art. 9, sec. 15; *Stifel v. Southern Cooperage Co.*, 38 Mo. App. 340; *Young v. Carendon Township*, 132 U. S. 349; see, also, other authorities cited and quoted, *post*, in argument of this point. (3) The city charter (sec. 10, art. 9) required the cost of district sewers to be computed and apportioned by the board of public works; also, that the board of public works "apportion and charge the same as a special tax

against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets," etc. The special taxbill sued on is therefore void, because neither it nor any proceeding of the board of public works recites: (1) The area of the lands in the sewer district; (2) the area of the land described in this taxbill; (3) that the land described in the taxbill was charged according to its area of the lands in the district, the principle or basis of the city charter provision; or, (4) that the sum charged in this special taxbill was apportioned and charged thereon, by the board of public works. *Carroll v. Eaton*, 2 Mo. App. 479; *City of Linneus v. Locke*, 25 Mo. App. 407. And these objections are not removed by the later recital in the taxbills: "And the sum mentioned has been duly assessed and proportioned against the lands, as provided by law." This statement in the taxbill is a mere conclusion of the official who issued the taxbill, and counts for naught as evidence that the board of public works itself made the assessment or made it according to the area of lands in the sewer district. *Kansas City v. Railroad*, 81 Mo. 296; *Railroad v. Young*, 96 Mo. 42; *Yankee v. Thompson*, 51 Mo. 238; and see other authorities in argument of this point, *post*. Nor can it be presumed that the board of public works apportioned and charged the cost of the work, nor that it did so, on the basis or principle authorized by the city charter, when no such action is recited in the special taxbill or other proceeding of the board of public works. The absence of such recital by the board of public works rather raises the presumption that the board of public works did not thus apportion the cost of the work nor at all. *Smith v. Omaha*, 49 Neb. 883; *Cooly on Taxation* (2 Ed.) 480-1; *Kelly v. City of Chicago*, 193 Ill. 324; *Hall v. Kellogg*, 16 Mich. 135; *Pearshall v. Supervisors*, 71 Mich. 438; *Kansas City v. Railroad*, 81 Mo. 296; *Long v. Burnett*, 13 Iowa 29.

Especially is there no presumption of unrecited official action as to a municipal board, like the board of public works, which is required to make and keep a record of all of its acts. *Fruin-Bambrick Con. Co. v. Geist*, 37 Mo. App. 515; sec. 15, art. 9, of Kansas City charter. (4) A recovery on the taxbill sued on was unauthorized because: the contract of Dickey with Ford, under which the work was done and the taxbills were procured by Dickey, was in effect a transfer of the contract of the city with Ford, or a subletting of the work embraced within it, by Ford to Dickey in violation of the city contract prohibiting any transfer of the contract or any subletting of the work. *Hardy Co. v. Iron Works*, 129 Mo. 222; *Lansden v. McCarthy*, 45 Mo. 106; *Boykin v. Campbell*, 9 Mo. App. 496; *Deffendaugh v. Foster*, 40 Ind. 384; *Burke v. Taylor*, 152 U. S. 634; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Smelting Co. v. Mining Co.*, 127 U. S. 379; *Delaware Co. v. Safe*, 133 U. S. 473; *Light Co. v. Hampstead*, 38 N. Y. App. Div. 353; *Fortunato v. Patton*, 147 N. Y. 282; 2 Am. and Eng. Ency. Law (2 Ed.), 1035. (5) If, as testified by plaintiff, and his witness, the Ford-Dickey contract was neither a transfer of the contract with the city nor a subletting of the work embraced therein, then it must be a mere mortgage or pledge of the taxbills by Ford to secure Dickey for the loans and materials he contracted to furnish him for the construction of the sewers, and as such mortgage or pledge is made void by our statute because of the usurious provisions of this contract, plaintiff should not recover on any view. *R. S. 1899*, sec. 3710; *Keim v. Vette*, 167 Mo. 403; *Western Storage Co. v. Glassner*, 169 Mo. 38; 29 Am. and Eng. Ency. Law (2 Ed.), 487-8; *Morse v. Wilson*, 4 T. R. 353; *Weaver v. Burnett*, 110 Iowa 567; *Cobb v. Day*, 106 Mo. 208. (6) The taxbill sued on is void because the dimensions, material and character of the sewers were not prescribed by ordinance. *Kansas City Charter*, sec. 10, art. 9; *Dickey v. Holmes*, 109

Mo. App. 721; Ludenberg v. Chicago, 183 Ill. 572; Coggeshall v. Des Moines, 78 Ia. 235; Rich Hill v. Donovan, 82 Mo. App. 386. (7) The court erred in ordering and adjudging that the amount of the judgment herein bear ten per cent per annum. R. S. 1899, sec. 3707; St. Louis v. Allen, 53 Mo. 57; Plum v. City, 101 Mo. 525.

Clarence S. Palmer and Karnes, New & Krauthoff
for respondent.

(1) With respect to the first point made by appellants, the record discloses the following: (a) The taxbill sued on was issued November 30, 1896. (b) The action was instituted May 28, 1901. (c) The taxbill bore interest at the rate of ten per cent per annum from date of issue. Charter of Kansas City, p. 163, sec. 23. The taxbill was payable in installments; and if the installments had been promptly paid, the rate of interest would have been seven per cent. Default was made, however, in all of the installments, and hence under the provisions of the charter cited the taxbill bore ten per cent interest. (d) Accordingly, at the bringing of the action, the amount due on the taxbill was the face of the taxbill, \$9,787.95, together with interest from November 30, 1896, to May 28, 1901, at ten per cent per annum, or \$4,404.57, a total of \$14,192.52. (e) The note executed by Dickey and which is the basis of defendants' contention, was dated February 11, 1901; was due six months after date, August 11-14, 1901, and bore no interest until maturity. (f) Dickey was personally liable for the payment of this note, and in any event, on the payment of the note was entitled to a return of the taxbill. In no phase of the case was the bank in Pennsylvania entitled to more than the face of the note, that is, \$12,500; and the difference between \$12,500 and \$14,192.52, the amount due on the taxbill, together with accrued interest at the beginning of the suit, was clearly the property of

Dickey. (g) The note executed by Dickey was paid when due. The contention of appellants is predicated of Revised Statutes 1899, section 540: "Every action shall be prosecuted in the name of the real party in interest." This section of the statute must be read in connection with Revised Statutes 1899, section 542: "All persons having an interest in the subject of the action, and obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article." *Fisher v. Patton*, 134 Mo. 54. Assuming, for the purpose of argument, that Dickey had pledged the taxbill as collateral security for a loan, the record shows that the note for which the taxbill may have been pledged was not due when this action was instituted, and that no default ever occurred in the payment of the note. The pledgor remains the owner of the pledged property, and in the event that the pledgee disposes of the same in an invalid manner, the pledgor may have an action for conversion. *Greer v. Bank*, 128 Mo. 559; *Bank v. Richardson*, 156 Mo. 270; *Richardson v. Ashby*, 132 Mo. 238; *Hagan v. Bank*, 182 Mo. 319. "In the case of a pledge, the title does not pass to the pledgee, but remains in the pledgor." *Conrad v. Fisher*, 37 Mo. App. 403; *Van Idour v. Nelson*, 60 Mo. App. 523. The right of plaintiff to maintain the action is illustrated by the case of *Matthews v. Railroad*, 142 Mo. 658. Dickey and the bank, having joined as parties plaintiff, and it appearing on the trial that the interest of the bank had then ceased, the name of the bank would have been stricken out as a party plaintiff. R. S. 1899, sec. 657; *Ins. Co. v. Railroad*, 74 Mo. App. 74; *Hoagland v. Vanetten*, 35 N. W. 869, 22 Neb. 681; *Bank v. Hayes*, 112 Cal. 75.

(2) (a) In Missouri, it is well settled that a blank endorsement of paper not negotiable is a mere authority to the holder to fill it up; until this is done, the legal title remains in the payee. *Taylor v. Larkin*, 12 Mo. 105; *Wiggins v. Rector's Executor*, 1 Mo. 478;

Menard v. Wilkinson, 2 Mo. 92. (b) If it be claimed that the endorsement on the back of the taxbill operated as a mortgage of the taxbill, the same defect obtains. The very essence of a mortgage is an assignment of a chose in action for the payment of a debt, and unless there is a valid assignment, completely executed, there can be no valid mortgage. But, as hereinafter shown, if the endorsement operated as a mortgage, then, as against everybody except the mortgagee, the mortgagor remains the owner of the taxbill. Benton Land Co. v. Zeitler, 182 Mo. 267; Adams v. Shirk, 117 Fed. 805. (c) If it be claimed that in some manner the taxbill in question was pledged to the bank in Pennsylvania, then as to this phase of the case, there is a total failure of pleading and of proof. The most that can be said of the answer, so far as this phase of the case is concerned, is that the answer pleads that the Abell Company "delivered" the taxbill to the bank in Pennsylvania, and "said bank accepted, held and retained same exclusively within its possession and as the holder thereof for value until on or about August 14, 1901." The answer does not plead the essential elements of a pledge, but merely a delivery of the taxbill. A delivery of the taxbill, without more, would not constitute the bank in Pennsylvania anything except a mere bailee for the real owner of the bill. So far as the allegation "as a holder thereof for value" is concerned, this is a mere conclusion of law and does not present a traversable issue of fact. Without a delivery there can be no valid pledge. Christian v. Railroad, 133 U. S. 233; 18 Am. and Eng. Ency. Law (1 Ed.), 595, 597; Conrad v. Fisher, 37 Mo. App. 352; Vanstone v. Goodwin, 42 Mo. App. 39; Staples v. Sampson's Admr., 60 Mo. App. 73; Casey v. Cavaroc, 96 U. S. 467. Again, the cases show that the pledgor remains the owner of the property, but in the event that the pledgee disposes of the same in an invalid manner, the pledgor has an action

for conversion. Greer v. Bank, 128 Mo. 559; Bank v. Richardson, 156 Mo. 270; Richardson v. Ashby, 132 Mo. 238; Hagan v. Bank, 182 Mo. 319. It has also been decided by this court that one who holds a demand partly in his own right and partly in the right and for the benefit of another is, as to the other, the trustee of an express trust. Phillips v. Laclede County, 76 Mo. 68.

GANTT, J.—This is an action begun in the circuit court of Jackson county, by the plaintiff, against James B. Porter and Tellie D. Porter, his wife, to enforce a certain taxbill issued on the 30th of November, 1896, and numbered 851, by the board of public works of Kansas City, in part payment for the construction of a certain sewer in said city, as provided by ordinance number 7109 of the said city, approved January 11, 1896, against certain real estate therein described. The said taxbill was payable in four equal installments of twenty-four hundred forty-six dollars and ninety-eight and three-fourths cents each. Judgment was obtained in the circuit court of Jackson county and the defendants appealed to this court.

Since the appeal was lodged in this court, one of the appellants has died, leaving as his sole heirs at law, his widow Tellie D. Porter and his three children, Jesse Lee Porter, James Burrell Porter and Emily Hall Porter. J. Lee Porter, a brother of the deceased, has been appointed and is the duly qualified and acting administrator of his estate. Proper steps have been taken in this court to revive the action against the widow and heirs and administrator of James B. Porter, deceased.

The petition in substance states that the defendants are the owners of the real estate described in the petition as a part of the southeast quarter of the northeast quarter of section 17, township 49, range 33, and particularly described by metes and bounds,

and it is alleged that the same is now platted as lots one, two, three, and lots eight to fourteen inclusive, in block two, and all of blocks three, four and five and the west half of block six, Creston; that said taxbill was issued by the board of public works on November 30, 1896, and numbered 851, against said described real estate in part payment for constructing district sewer in sewer district number 59, as provided by ordinance 7109 of Kansas City, Missouri, entitled an ordinance to construct district sewer in sewer district 59, approved January 16, 1896; that it appears from said taxbill and plaintiff states the fact to be that said work was completed according to contract by E. N. Ford, contractor, to whom this special taxbill was issued in part payment therefor, and the sum mentioned has been duly assessed and proportioned against the aforesaid land, being the exact amount chargeable against said land; that said taxbill is payable in four equal installments of twenty-four hundred and forty-six dollars and ninety-eight and three-fourths cents each, on presentation of the three installment coupons thereto attached at maturity thereof, the fourth and last installment of twenty-four hundred forty six dollars and ninety-eight and three-fourths cents, being payable on the 31st day of May, 1900, with interest thereon as herein mentioned, on the surrender and cancellation of said taxbill. And it is further provided that said taxbill shall bear interest from the date of the issue thereof at the rate of seven per cent per annum, and when any installment shall become due and collectible, as therein provided, interest thereon and on all unpaid installments shall be due and collectible to that date. It is further provided in said bill that if any installment of said taxbill or interest thereon be not paid when due, then all the remaining installments shall become due and collectible, together with the interest thereon, at the rate of ten per cent per annum from the date of issue of

said taxbill, less the sum of any interest that may have been already paid on such installment. It is alleged that the defendants have failed and refused to pay any part or portion of said taxbill or of any of the installments thereon, and that the same, and each and all of the installments thereof, are due and payable with interest at the rate of ten per cent per annum from November 30, 1896. That said taxbill had been assigned by the said E. N. Ford, contractor, to the plaintiff.

Plaintiff prayed judgment for the amount of said taxbills \$9,787.95, with interest from October 30, 1896, at ten per cent, and costs, and for the enforcement thereof against the real estate aforesaid. Attached to said petition was what purported to be the said taxbill numbered 851, with the three installment coupons attached thereto; and endorsed: "Kansas City special taxbill, issued on the installment plan for constructing district sewer in sewer district number 59. Registered. Number 851. For \$9,787.95. Volume 37, page 112 in said Engineer's office."

On June 30, 1902, the defendants James B. Porter and Tellie Porter filed their amended answer, wherein they admitted, first, that they were the owners of the real estate described in the petition and situated in Kansas City, Missouri, but deny each and every other allegation in the petition.

Second. Defendants further answering say that at the time of the commencement of this action plaintiff was not the real party in interest in the pretended taxbill No. 851 issued under the pretended ordinance of Kansas City, No. 7109, for that on or about February 11, 1901, plaintiff, for value, assigned, set over and delivered same to Abel Bond & Brokerage Company, which, in turn, delivered same to Union National Bank of Mahoney City, Pennsylvania, and said bank accepted, held and retained same exclusively within its possession, and as a holder thereof for

value, until on or about August 14, 1901, and long after the commencement of this action.

Third. Defendants for further answer to the petition state that the alleged taxbill mentioned in the plaintiff's petition is null and void, and plaintiff is not entitled to the relief sought by him for the following reasons:

1. That the dimensions, material and character of said district sewer were not prescribed by the ordinance of Kansas City, No. 7109, which pretended to provide for the construction of said sewer, but in respect to the portions of said sewer to be constructed of sewer pipe and length and quality of masonry required to support the brick portion, the same was left wholly to the discretion of the city engineer of Kansas City, and whatever material and work of that character were put into said sewer, the dimensions and quality thereof, were fixed and determined by said city engineer and his assistants, and not otherwise.

2. That the board of public works of Kansas City, Missouri, did not compute the whole cost of said sewer, nor of any part thereof.

3. That said ordinance No. 7109, which pretended to provide for the construction of said sewer, was void in that it did not specify any time within which said work was required to be completed.

4. That the contract under which said Ford pretended to perform said work and upon which the pretended taxbill sued upon herein is based was null and void, for that the performance of said contract was not guaranteed by two or more securities signing said contract as required by the Revised Ordinances of Kansas City No. 41982, approved May 12, 1888, and the city charter of said city, all then in force and governing the execution of said contract.

5. That said pretended contract, if valid, which defendants deny, took effect and bound said Ford on and after March 26th, 1896, on which day an ordinance

pretending to confirm said contract was passed by the common council of Kansas City and approved by the mayor; that said contract contained the following, among other stipulations and agreements:

“The work embraced in this contract shall be begun within ten days after this contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter (unless the engineer shall specially direct otherwise in writing), with such force as to secure its full completion within one hundred and eighty days from the date of its confirmation; the time of beginning, rate of progress and time of completion being essential conditions of this contract. And if the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of ten dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work.”

That the time for the completion of said work expired September 22, 1896, and was not extended. That this work was not completed until long thereafter, to-wit, on or about November 15, 1896. That by a certain ordinance of the City of Kansas, No. 41982, approved May 12, 1888, being Revised Ordinances of the City of Kansas of 1888, and by section 921 thereof, it was enacted:

“Sec. 921. Whenever any ordinance shall provide for the construction of any public sewer, district sewer, drain or culvert, the same shall, unless therein otherwise especially provided, be deemed and taken to require that all excavation and materials necessary for the work shall be done and furnished by the contractor or contractors; that all necessary laterals, inlets and other appurtenances shall be constructed, and that, after the work of constructing the sewer proper shall be completed, the excavation over and around the same shall be filled in with earth or stone by the con-

tractor or contractors, all as a part of the work, so as to protect the same and leave the surface of streets, avenues, alleys, lots and other places over the same level and safe and in as good condition as before the work was commenced."

And by said contract it further stipulated that: "This contract is entered into subject to the approval or rejection of the common council, and shall not bind until so approved, and is subject to the city charter and ordinances in general, and in particular to the provisions of chapter 46, Revised Ordinances, which chapter is made part of this contract."

But, in violation of said stipulation and general ordinances, on September 22, 1896, the excavation over and around said sewer had not been filled with earth by said contractor, and said sewer was not on said date protected, and the surface of streets, avenues, alleys and the lots of ground through and under which said sewer was constructed had not on said day been left level and safe and in as good condition as before work was commenced.

6. That the pretended taxbill mentioned in the petition herein was never delivered to E. N. Ford, the contractor and party in whose favor said taxbill was made out for collection, and the receipt of said Ford was not taken at the foot of the taxbill register in full of his claim, if any, against the city, as required by law.

7. That by said ordinance of the City of Kansas, No. 41982, and section 922 thereof, it was provided:

"Sec. 922. Unless the ordinance for causing a public sewer, district sewer, drain or culvert to be constructed otherwise provide, the city engineer shall advertise for bids for doing the work in the official newspaper of the city, for the same length of time and in the same manner as may be provided by ordinance for advertising for bids for grading streets or avenues."

That said ordinance No. 7109 did not "otherwise provide."

That the ordinance relative to the advertising for bids for grading streets or avenues was said ordinance of the City of Kansas, No. 41982, and section 990 was as follows:

"Sec. 990. When any ordinance shall provide for the doing of any work mentioned in the first section of article VIII of the City Charter, the city engineer shall, as soon as practicable thereafter, make out the necessary plans and specifications, which shall, in cases where the contract must be let to the lowest and best bidder, prescribe a time within which the work shall be finished, and the amount of security to be given by the contractor for the performance of the work. As soon as practicable thereafter, and after taking other requisite preliminary steps, in case a contract is to be let to the lowest and best bidder, the city engineer shall cause to be published, for ten successive days, within twenty days next preceding the time for opening bids, in the newspaper doing the city printing, or, if there be none, in such daily newspaper, published in the city, as he may select, a notice of the letting of the contract for such work to the lowest and best bidder. Such notice shall state generally the nature of the work to be done, where the plans and specifications thereof may be seen, and the day when bids will be open."

That no notice of the letting of the contract under said Ordinance No. 7109 to the lowest and best bidder was published, and that no advertisement was ever published giving a description of the work to be done, and the materials, dimensions and character of same, and plans and specifications for such work were not made out, nor was the time for finishing the work and the amount of the security to be given by the contractor fixed prior to the pretended letting of said work.

8. That by said ordinance of the City of Kansas, No. 41982, and section 924 thereof, it was provided:

“Sec. 924. Before advertising for bids for doing any of the work mentioned in the first section of this chapter, the city engineer shall make out detailed plans and specifications for the work to be done, and keep the same on file in his office for information of all desiring to bid on the work.”

That said “first section of this chapter” is section 921 of Ordinance 41982 of the City of Kansas, heretofore set out.

That the city engineer of Kansas City pretended to advertise for bids for said sewer without first having made out detailed plans and specifications for the work to be done.

9. That said pretended taxbill embraced the cost of large quantities of stone, masonry, granitoid, rock, excavation, earth embankment, lumber and drain pipe, none of which materials were required to be furnished and none of which work was required to be done by the pretended Ordinance No. 7109.

10. That said contract contains this further stipulation, to-wit: “The first party shall not assign nor transfer this contract, nor sublet any of the work embraced in it.”

That prior to the commencement of the work under said pretended contract, and prior to the making of any final estimate of the cost thereof, the contract or pretended contract with said Ford for the doing of said work and the rights of said Ford thereunder, were assigned and transferred in violation of the terms and provisions of said contract, and said contract was thereafter of no validity.

11. That the pretended taxbill sued upon herein was not made out and certified by the president of the board of public works nor in his name by any person,

or persons, thereunto specially authorized by said board.

12. Defendants state that the lien of the pretended taxbill, if any ever existed, has long since expired, and that said taxbill has ceased to be a lien upon the real estate therein, and in plaintiff's petition described; that defendants state that no notice of the bringing of this suit has ever been filed with the city treasurer of Kansas City, Missouri, showing the taxbill sued on herein, and when and in what court, and against whom this action was brought, and that no notice whatever of the bringing of said suit has been filed with the city treasurer of Kansas City, Missouri.

13. That at the time of the letting of the contract for said sewer, and until long after November 30, 1896, one George J. Baer was a member of the board of public works of Kansas City, and, notwithstanding said membership, was interested in said contract and in the furnishing of materials and labor for the construction of said sewer, and the profit arising therefrom.

Wherefore, having fully answered, defendants pray to be dismissed with their costs.

In due time plaintiff filed a reply denying all the new matter alleged in the answer. The jury was waived and the cause was tried to the court and on the second day of August, 1902, judgment was rendered for the plaintiff and a lien decreed upon the said real estate for the enforcement thereof and special execution directed as required by law. In due time the defendants filed their motions for a new trial and in arrest of judgment, which were overruled. At the October term, 1902, an appeal was allowed to this court. Various assignments of error are urged for the reversal of the judgment, and they will be considered in the order of defendants' brief.

I. The dominant question in this case and the one to which the respective counsel have devoted the most

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of their time in the discussion, is whether the plaintiff was the real party in interest in the taxbill sued on, at the commencement of the action on May 28th, 1901, and therefore authorized to maintain the suit. This issue is presented in a double aspect. First, by the denial in the answer of the allegation in the petition that "said taxbill has been assigned by the said E. N. Ford, contractor, to the plaintiff Dickey," and, second, by the affirmative defense "that at the time of the commencement of this action plaintiff was not the real party in interest in the pretended taxbill No. 861, issued under the pretended ordinance of Kansas City No. 7109, for that on or about February 11, 1901, plaintiff for value assigned, set over and delivered the same to Abel Bond & Brokerage Company, which, in turn, delivered the same to the Union National Bank of Mahoney City, Pennsylvania, and said bank accepted, held and retained the same exclusively within its possession and as a holder thereof for value until on or about August 14, 1901, and long after the commencement of this action."

As to the first of these contentions, it is sufficient to say that on the trial the plaintiff introduced in evidence a written contract between the contractor, Ford, and the plaintiff, Dickey, of date March 12, 1896, whereby Ford agreed, for value received and to be received by him of Dickey, the plaintiff herein, that, when said taxbill should be issued, said Ford should at once assign and transfer to such person as said Dickey might name, all the taxbills which should be issued under the said contract and ordinance, which assignment was to be executed concurrently with said contract and filed in the proper office, and the evidence further discloses that Ford, in pursuance of that contract, executed a power of attorney to Henry Millson to receive and receipt for the said special taxbills and also assigned and transferred the same to said Millson on the thirteenth of March, 1896, and that Millson on

the sixteenth of March, 1896, assigned all the rights, interests and powers in said instruments to the plaintiff, Dickey, and by virtue of these instruments the taxbills were delivered to Dickey. The defendants asked no instructions of the court, or any declaration of law, that the evidence of the assignment by Ford to Dickey was not sufficient to convey the title in the taxbills to the plaintiff. But for another reason, we do not think that the defendants are in a position to assert that the plaintiff did not acquire the ownership of the taxbills as between Ford, the original contractor, and the plaintiff Dickey, for the reason that the defendants themselves in the new matter alleged in their answer as to why plaintiff was not the real party in interest, state that plaintiff did before the bringing of this action, to-wit, about February 11, 1901, for value assign, set over and deliver the said taxbill to the Abel Bond & Brokerage Company, which, in turn, delivered it to the Pennsylvania bank. In a word, this defense stands upon a plea that at the time the suit was brought, the bank in Pennsylvania was the owner of the taxbills and the owner thereof for value. This affirmative defense is entirely inconsistent with the claim now advanced under the general denial that Dickey never owned the taxbill, but is a plain argument that in fact he did own it, but had assigned it to the bank in Pennsylvania prior to the bringing of this suit. Elsewhere in the answer the defendants pleaded that Ford, the original contractor, assigned and transferred the contract for the doing of said work and the rights of said Ford thereunder to the plaintiff, Dickey, one of which rights was that to the bills to be issued under the contract. We need not, therefore, devote further time as to the allegation that Ford assigned the taxbill in suit to the plaintiff. That was a question of fact, and there was ample evidence to support the finding of the court thereon.

The other proposition, to-wit, that Dickey, the

plaintiff, was not the real party in interest at the time of the bringing of this suit, for the reason that the taxbill sued on had been assigned or pledged as a security for Dickey's note for \$12,500, executed February 12, 1901, and due six months after date, requires consideration. This defense is purely technical. Conceding for the nonce that there was sufficient evidence to have authorized the court to have found that the Bank of Mahoney did receive and have in its possession the identical taxbill, upon which this action is being maintained, by way of a pledge or collateral security, it is clear that at most it was only an equitable assignment or pledge of the taxbill to secure a less sum evidenced by plaintiff's note to the Mahoney Bank. Under this state of facts, the great weight of authority in this country is that where the owner of a mortgage has pledged it as collateral security for a debt of less amount than the mortgage, he still has such an interest in it as entitled him to bring an action for the foreclosure of the mortgage. Vice-Chancellor McCoun held, in *Norton v. Warner*, 3 Edwd. Chy. (N. Y.) 106, in such a case, that "complainant had not divested himself of all interest in or control over the mortgage. The assignment is but a partial one, made to secure to the pledgee the payment of the loan, being less than the amount due on the mortgage. In equity, he is still the owner, subject only to the lien or pledge for the loan. The pledgee might have filed a bill of foreclosure against the original mortgagor and all parties in interest, and in that case the pledgee would have been deemed a trustee for the mortgagee for the whole mortgage debt after satisfying his claim."

No substantial difference can exist between the relation of a mortgagee who has pledged his mortgage for a less debt of his own, and the owner of a taxbill lien who pledges the same as plaintiff did the taxbill in this case to the Pennsylvania bank. The doctrine announced in *Norton v. Warner*, *supra*, has been re-

peatedly followed in New York. In *Ridgway v. Bacon*, 72 Hun l. c. 214, it was said: "The fact that Smith holds or claims to hold the note and assignment as collateral to some promise or liability of Muller is not a good defense in favor of Bacon. It has long been settled that one who has assigned a lien as collateral security may, if he have an existing interest in it, maintain an action for its enforcement, and that the assignee is a necessary party to such an action." [*Simson v. Satterlee*, 6 Hun 305; *Ibid v. Ibid*, 64 N. Y. 657; *Burlingame v. Parce*, 12 Hun 149.]

These cases but announce the law as stated in the 22 Am. & Eng. Ency. Law (2 Ed.), 864: "A contract of pledge, although it confers upon the pledgee the title in the sense that he is entitled to maintain trover or replevin against a stranger, does not divest the pledgor of the general property in the thing pledged, and notwithstanding such contract the pledgor has title to the property subject to the pledgee's lien." [*Thompson v. Dolliver*, 132 Mass. l. c. 104; *Williams v. Rorer*, 7 Mo. 558; *Brewster v. Hartley*, 37 Cal. 25.] Story on Bailments (4 Ed.), page 311, section 308, says that, "Under the common law the right to sell the pledge results from the default of the pledgor in complying with his engagement. Such a right does not divest the general property of the pawnor, but still leaves him a right of redemption." It is well settled that upon the pledgor's default, the property and the thing pledged does not become absolutely vested in the pledgee and the general property still remains in the pledgor. [22 Am. and Eng. Ency. Law (2 Ed.), 865, and cases cited.] In *Conrad v. Fisher*, 37 Mo. App. l. c. 403, it is said: "In the case of a pledge, the title does not pass to the pledgee, but remains in the pledgor. . . . The pledgee, therefore, is not the owner, but the mere holder of a possessory lien." In *Richardson v. Ashby*, 132 Mo. 245, this court said: "Non-payment of the original debt at the

stipulated time does not work a forfeiture of the pledge, either by the civil or at the common law. No title to or ownership in the collateral by forfeiture inures to the benefit of the pledgee by the maturity of the debt or by the lapse of time. . . . Title or ownership of the pledge, when the subject of it consists of ordinary goods and chattels, remains in the pledgor; the pledgee taking only a lien on it, as security for his debt." In that case, this court, in speaking of the relation of the pledgee to negotiable commercial paper, said: "The peculiar character of the paper gives the pledgee an apparent absolute ownership in, and right of disposition over, the pledge, and in fact the absolute right and power, so far as third persons taking the same are concerned, without a knowledge of the relation of the pledgee to the collateral." But in this case, as already said, the subject of the pledge is a special taxbill, and such taxbills are not negotiable instruments, but mere choses in action. [Young v. Brewster, 62 Mo. App. 632; see, also, Southworth Company v. Lamb, 82 Mo. 249.]

Numerous cases decided by this court in which the assignee of promissory notes, of which there is an unconditional assignment, is held to be a trustee of an express trust and also the real party in interest, do not solve the contention in this case, for the reason that in this case, there is no absolute assignment of the taxbill by the plaintiff to the bank in Pennsylvania, or to anyone else, but a mere pledge of the security to secure a debt of the plaintiff of less amount than that for which the taxbill was a lien. From the foregoing we deduce these propositions: first, that at the time of the commencement of this action the plaintiff had not divested himself of all interest in or control over the taxbill in suit, but had simply pledged it as a collateral security for his note to the bank for a less sum, and as there had been no default in the payment of his note to the bank, his general property in

the taxbill had not been divested, but he still had title thereto subject only to the pledgee's lien, and as he still had a present existing interest in it and indeed, it may be said, the principal interest in preserving the lien of the taxbill, he had a right to maintain this action to preserve and enforce the lien of the taxbill. Respectable authorities might be cited to show that in this condition of affairs both the plaintiff and the bank might have joined in this action to enforce the lien of the taxbill, but that the plaintiff was a party in interest, who might, in his own behalf, bring this suit, in view of the authorities above cited, it seems to us there ought not to be any question. Inasmuch as the note of plaintiff to the bank matured on the 14th of August, 1901, and was paid on that date, when the case came on for trial the bank's interest had entirely disappeared on account of the payment of its note, the bank's name would have been stricken out of the petition when the attention of the court was called to that fact, and no good reason can be assigned why the plaintiff might not then have proceeded to judgment for the whole amount of the taxbill and interest.

But it is said that this right of the plaintiff to sue and preserve his lien of the taxbill in suit, is purely an equitable right, and that this is not a suit in equity. Keeping in view now that we are discussing the proposition whether the plaintiff is the real party in interest under our statute, section 540, Revised Statutes 1899, which requires, "Every action shall be prosecuted in the name of the real party in interest," the reasons which actuated the Legislature in making this provision as to parties, must be kept in view. At the time this section was adopted, the Legislature also adopted section 539, which provides, "There shall be in this State but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action." It was entirely competent for

the Legislature to have retained either the common law rules in regard to parties to actions thereafter instituted, or to have adopted the rules of the chancery courts as to the proper parties to a suit. But as the old forms of actions were abolished, and one civil action substituted in their stead, it was deemed necessary to provide as to the parties to this new action, and by providing that the action should be prosecuted in the name of the real party in interest, the Legislature in substance adopted the rule as to parties, which had theretofore prevailed in the courts of equity. At common law, the assignee of a cause of action could bring an action thereon only in the name of his assignor, while in equity the assignee must sue in his own name. Under our code the assignee is the real party in interest, and as such, must prosecute in his own name. If it be said that a mortgagee, who has assigned his mortgage as a security or pledge for a loan of less amount than the mortgage, could only foreclose in his own name in equity, still as the authorities all agree that the pledgor in such circumstances is still a real party in interest and the statute requires the action to be brought in the name of the real party in interest, how can it be said that he may not bring his action to enforce the lien of a taxbill in a court of law under the code as well as in a court of equity? If we are to look at the substance of things and not mere forms, we can see no reason why the plaintiff in this case who, of all other persons, was most vitally interested in the preservation and enforcement of this lien, should not have been allowed to prosecute and maintain this action.

Again, that it would have been competent for the plaintiff and the bank to have joined in the bringing of this suit, there can be no doubt, and the failure to join the bank could at most have only been a defect of parties plaintiff, and as that fact did not appear upon the face of the petition, it could have been taken

advantage of by an answer, but the answer in this case does not ask nor demand that the bank of Mahoney should be made a party, plaintiff or defendant, in this action, and indeed when the answer was filed on the 30th of June, 1902, the bank was not a necessary party to the action, because on the 14th of August, 1901, it had received full payment of its note from the plaintiff and no longer held the taxbill in pledge. In nothing that we have said are we to be understood as holding that the pledgee of a lien may not bring a suit in his own name, for the authorities are ample that he may do so, though the extent of his recovery for himself will be the amount of the debt which the pledgor owed him, and he would be the trustee for the pledgor for the overplus. Likewise, it has been ruled that where the pledgor recovers dividends or interests or other accretions to the lien, he will be adjudged to hold the same in trust for the pledgee until the latter's debt is satisfied.

As this case presents a question out of the ordinary, it is essential that we keep in view the identical questions of law involved. By this action the plaintiff is seeking to preserve and enforce the lien of a taxbill in which he is vitally interested as the general owner thereof, and as the owner of as much thereof as exceeds the amount of his note to the bank in Pennsylvania, and as the pledgor of the security pledged by him to the bank for the benefit of the bank, and not to deprive the bank in any manner of the benefit of the pledge, but to preserve it so that in case of his default in the payment of his note the lien would inure to the benefit of the bank. Judge BLISS in his work on Code Pleading (3 Ed.), note to section 45, says: "This raises the question, 'who is the real party in interest?' The real party in interest is the party who is to be benefited or injured by the judgment in the case." Black, in his Law Dictionary, page 997, defines the real party in interest within the mean-

ing of this statute as follows: "In statutes requiring suits to be brought in the name of the real party in interest, this term means the person who is actually and substantially interested in the subject-matter as distinguished from one who has only a nominal, formal or technical interest in it, or connection with it." By his note to the bank, the plaintiff became absolutely indebted to the bank whether the lien was valid and enforceable or not. If he had permitted the statute of limitation to run and the taxbill should thereby have become valueless as a security, his obligation to the bank would have still remained absolute. The bank was taking no step to enforce the lien, and having brought this suit, it is obvious that it was the plaintiff who was to be benefited or injured by the judgment rendered in this case. The general title to the taxbill remained in the plaintiff at the date of the commencement of the suit, subject only to the lien of the bank. In *McKinster v. Bank of Utica*, 9 Wend. 46, it appeared that McKinster held a note executed by one Dann, and endorsed by Sprague and Dygert, and being indebted to one Pardee, McKinster delivered the note of Dann to Pardee as collateral security, and Pardee was authorized to receive the money and apply the same on McKinster's debt to him. Pardee left the note at the bank for collection; the note having become due and notice of non-payment not having been given to the endorers, Pardee took the note from the bank and demanded payment of McKinster, who paid him the amount thereof, and the note was delivered to McKinster. The maker and the endorers having become insolvent, McKinster sued the bank on account of its failure to notify the endorers so as to hold them for the amount of the note. The question in the case was whether the action was properly brought in the name of McKinster. The bank claimed that its contract, whatever it was, was with Pardee, the holder of the note as collateral security, and that the action

should have been brought in Pardee's name, and not in the name of McKinster. Upon this state of the case, the Supreme Court of New York, through Judge SUTHERLAND, said: "McKinster was the only person legally interested in having the endorsers duly charged; he was absolutely bound to pay the amount of this note to Pardee, if the note itself was not paid at maturity. The property of the note was not vested in Pardee; he held it as collateral security only, to be returned if not paid. The undertaking of the defendants to give notice to the endorsers of the non-payment of the note by the maker, was for the benefit of the plaintiff McKinster. The legal interest in such contract was in him alone, and even an action of assumpsit not only might, but should have been brought in his name." So in this case, while the taxbill had been pledged without any legal assignment thereof to the bank, the plaintiff remained the owner of the taxbill and was more vitally interested in preserving and enforcing the lien of the taxbill than anyone else as he was absolutely bound to pay his note to the bank whether the taxbill could be collected or not. Under these circumstances, without infringing in any manner upon the right of the bank to have brought the action in its own name for the benefit of itself, and as trustee for the plaintiff, we think the plaintiff was the real party in interest and authorized to bring suit to enforce the lien of the taxbill.

But if it be said that if we affirm the judgment in favor of the plaintiff, the defendants may be subjected twice to the payment of this taxbill, we answer, that it appeared by the proofs that the pledgee, the bank in Pennsylvania, has no longer any interest in the taxbill, because plaintiff paid his note to the bank on the 14th of August, 1901, long before the answer of the defendants, upon which this case was tried, was filed. And, moreover, the lien of the taxbill itself has long since expired and no one else can now bring an

action thereon. By section 17 of article 9 of the charter of Kansas City, the defendants could have avoided all danger of paying it to the wrong person by paying the amount of the taxbill to the city treasurer, as the charter expressly provides: "The person to whom any such taxbill may be issued or the assignee thereof, shall be entitled to receive the money so paid to the city treasurer on the delivery to the city auditor of such special taxbill duly receipted in full." In the case at bar, the taxbill was produced on the trial in the possession of the plaintiff and stands merged in the judgment, and the judgment itself can be paid in the office of the city treasurer.

II. It is next insisted that, inasmuch as section 15 of article 9 of the charter of Kansas City provides: "All special taxbills provided for by this charter, shall be made out and certified by the president of the board of public works, or in his name by any person or persons thereunto specially authorized by resolution in writing and recorded on the books to be kept by such board of public works and signed by the president of the board," the taxbill in this case is utterly null and void because the testimony shows that the board of public works made the order provided in this section of the charter whereby Marcus E. Getchell, chief clerk in the office of the city engineer, was "authorized to make out and certify in the name of George S. Graham, president of the board of public works, all special taxbills," and that Marcus E. Getchell did not make out the whole taxbill, and that one W. T. Cheever wrote the name of George S. Graham, and that the only thing done by Getchell was to write his own name thereunder. The taxbill on its face shows it was signed by 'Geo. S. Graham, president, by Marcus E. Getchell.' When the taxbill was offered in evidence, the objection was "it was incompetent because it has not been filled as required by the charter, and because there is no evidence of the as-

signment to plaintiff, which objections were overruled and the defendants duly excepted," so that the objection now urged was not made at the time the taxbill was offered. But aside from this, in *Jaicks v. Merrill*, 201 Mo. 91, this identical proposition came before this court, and we held that the contention of counsel that the taxbills were void because the signature of the president of the board of public works was signed by an officer designated for that purpose as provided in the charter, was not tenable. And we see no reason for departing from the ruling made in that case. A reasonable construction of the charter does not require the president of the board of public works, with his own hand, to do all the clerical work of making out these special taxbills, but when they are issued, as these were, by authority of the board of public works, and signed by its president by the party specially authorized by the resolution of the board, all the substantial requirements of the charter are complied with. The decisions of this court in *City of Nevada to use v. Eddy*, 123 Mo. l. c. 563, and *City of Sedalia to use v. Donohue*, 190 Mo. 407, in no manner conflict with this conclusion. In those cases it was ruled that the city council could not delegate to the city clerk the power to apportion the costs and assess each lot with its share and issue taxbills therefor. No such power was attempted to be delegated by the board in this case. The only power conferred upon Getchell was to attest the taxbill in the name of the president of the board of public works, and this was done in compliance with the provisions of the charter itself. This point must be ruled against the appellants.

III. The next assignment is that the special taxbill sued on is void because the basis or principle of the apportionment, or any legal apportionment by which the lands therein described are charged with

the amount of this taxbill, is not recited in the special taxbill or other proceeding of the board of public works. More specifically, the insistence is that because the taxbill does not contain a recital of the total area of the lands subject to assessment, or any affirmative or general statement that the lands described in the taxbill were charged according to the area of such tract of land, the taxbill is void. Section 10 of article 9 of the Kansas City charter authorizes the assessment of private property with the cost of district sewer, and provides that when the work of construction of a district sewer shall have been completed, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special taxbill against the lots of lands in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall make out and certify in favor of the contractor a special taxbill against each lot in the district. The taxbill in this case certifies that the real estate described therein being the same described in the petition "has been charged with the sum of \$9,787.95, as a special tax for constructing district sewers in sewer district number 59 as provided by ordinance number 7109 of Kansas City, Missouri, entitled 'An ordinance to construct district sewers in sewer district number 59,' approved January 11, 1896. Said work has been completed according to contract by E. N. Ford, contractor, to whom this special taxbill is issued in part payment therefor and the sum mentioned has been assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land, as provided by law for its portion of the cost of such work as a lien against said land for the period of one year after the last installment specified herein shall have become due and payable, and no longer, unless within such year suit shall have

been instituted to collect this taxbill," etc. Article 9 of the city charter does not specify what the contents of the taxbill shall be. The answer of the defendants does not plead any such defect in the face of the taxbill as is now asserted by this assignment of error, and when the taxbill was offered in evidence, no such objection as this was raised. In none of the thirteen declarations of law asked by the defendants was the court asked to declare the taxbill void for its failure to specify the whole area affected by the sewer, and the exact proportion that defendants' land bore to the whole district. The answer merely pleads that the board of public works of Kansas City did not compute the whole cost of said sewer, nor of any part thereof. On this issue the plaintiff read in evidence an abstract from the proceedings of the board of public works, which recites that the board of public works apportioned the cost of the work of constructing district sewer in sewer district number 59 as provided by ordinance number 7109, approved January 11, 1896, \$53,616.74. And the board of public works certifies that it has computed the cost of constructing said district sewer in sewer district number 59, and apportioned the sum among the several lots and parcels of land to be charged therewith, charging each lot or parcel of land with its proportionate share of such cost. Said apportionment is now certified to the city treasurer, and taxbills therefor according to such computation, apportionment and charge, are made out, certified and registered and the city treasurer is ordered to deliver the same to the parties in whose favor they are made out, for collection, and take the receipt of said parties at the foot of the register in full of all claims against Kansas City on account of work for which said taxbills have been made out. When this proof was offered no objection whatever was made to the record. The taxbill herein sued on, on its face shows that it was issued under ordinance number 7109,

and in part payment for the construction of said sewer and was the exact amount chargeable against said lands of the defendants. The plaintiff also offered the said apportionment of the special tax for constructing said district sewer in district number 59, which showed upon its face the number of the bill, the tract of land described therein, the total amount of the tax assessed against said district and the amount of each installment. The contention of the defendants that the taxbill should show on its face every prerequisite step necessary to its validity, is not tenable. It was ruled to the contrary in *Keith v. Bingham*, 100 Mo. 300. We think the taxbill was sufficient even if the point now urged against it had been timely made. It is a substantial compliance with the charter provision.

IV. The taxbill is again assailed because it is insisted that the contract of Dickey with Ford, the contractor, was in effect a transfer of the contract of the city with Ford, or was a subletting of the work embraced within it by Ford to Dickey, in violation of the city's contract with Ford, which prohibited any transfer of the contract or any subletting of the work. The contract between Dickey and Ford of date March 12, 1896, was offered and read in evidence by the plaintiff and the circuit court did not construe said contract as assigning the contract between Ford and the city, or as a subletting of the same, and we think the court properly interpreted the contract. The whole evidence, we think, shows that Ford himself performed the contract and the city has certified that he did do it in every respect in compliance with his contract, and issued him the taxbill according to its agreement with him. It was entirely competent for Ford to borrow money from Dickey, the plaintiff herein, and secure him for such loan; on the other hand, it was entirely competent for Dickey, who was

advancing Ford the money with which he would be enabled to perform his contract with the city, to employ Mr. Donnelly, a competent engineer, to see that Ford carried out his contract with the city, as the validity of the taxbills, which Ford had agreed to assign to Dickey as security for his advances, depended upon Ford's performing his contract with the city. Moreover, there is a palpable difference between assigning moneys due under a contract and an assignment of the contract itself. We think there is no merit in this assignment.

V. It is next insisted that plaintiff ought not to recover in this case because of the usurious nature of the contract between Ford and Dickey. As to this, it is sufficient to say, no such objection was made when the contract between Dickey and Ford was offered and read in evidence and the circuit court was not asked to declare that such contract was usurious. In this case the plaintiff is asserting his right to enforce the lien of this taxbill, and the interest which the taxbill bears on its face is not usurious. So far as the defendants are concerned, they can in no event be charged with or required to pay any usurious interest; they are liable, if liable at all, simply for the amount of the taxbill, and the lawful interest thereon, and that is all that the plaintiff seeks in this case, but it is unnecessary to dwell upon this assignment because there is no such defense pleaded in the case, and no such proposition raised in the circuit court. By section 864, Revised Statutes 1899, we are expressly prohibited from regarding any exceptions except "such as shall have been expressly decided by the trial court," and a defense not raised in the lower court will not be determined on appeal. [Meddis v. Kenney, 176 Mo. 200; Adair v. Mette, 156 Mo. 507; Cornelius v. Grant, 8 Mo. 59; Hart v. Leete, 104 Mo. 338.]

VI. The taxbill is also assailed because the thick-

ness of the sewer pipe was not prescribed by ordinance. The charter provides "that such sewer or sewers shall be of such dimensions, material and character as shall be prescribed by ordinance." The answer alleged "that the dimensions, material and character of said district sewer were not prescribed by the ordinance of Kansas City number 7109, which pretended to provide for the construction of said sewer, but in respect to the portions of said sewer to be constructed of sewer pipe, the length and quantity of masonry required to support the brick portion, the same was left wholly to the discretion of the city engineer of Kansas City, and whatever material and work of that character went into said sewer, the dimensions and the quantity thereof were fixed and determined by said city engineer and his assistants, and not otherwise." When the ordinance was introduced in evidence counsel for defendants said, "We do not seriously contend that the length of the sewer was not set forth, or the interior diameter, but our contention is that the thickness of the pipe of that portion of the sewer was not sufficiently designated." No exceptions were saved to the admission of the ordinance in evidence. The ordinance itself required: "All of said sewers of twenty-one inches or less in interior diameter shall be constructed of vitrified clay pipe, and all of said sewers two feet or more in interior diameter shall be constructed of hard burned brick, laid in hydraulic cement mortar." And section 3 of the ordinance provides: "Said sewers shall conform in details to the plans and specifications prepared for the construction of said sewers, now on file in the office of the board of public works, marked approved, and dated December 3, 1895." In the consideration of this assignment, it will be well to keep in view that this court, in *Becker v. City of Washington*, 94 Mo. 1. c. 380, settled the law as to defenses of this character after this manner: "No good reason

has been or can be assigned why the specifications should have been embodied in the ordinance, nor can it be shown how the omission to do so could in any manner effect the validity of the ordinance. The reference to them as on file in the office of the clerk, where they could be seen by any one interested, made the ordinance as definite and certain in that respect as if they had been embodied in the ordinance. *Id certum est quod certum reddi potest*, and in this connection it may be added that it does not 'lie in the mouth' of the defendant now to assert that the specifications were not on file in the office of the city clerk at the time the ordinance was passed, in the face of its admission, on its own record, and in the recitals of the ordinance itself, that at that time they were on file there." And in *Paving Company v. Ullman*, 137 Mo. l. c. 571, it was ruled that "the reference in the ordinance to the specifications in the office of the engineer was quite sufficient as a description of such work. It was not necessary for all the details of the working plan to be developed in the ordinance itself. [*Becker v. Washington*, 94 Mo. 375.]" The ordinance in this case having provided that the work should conform to the plans and specifications then on file in the office of the board of public works, those plans and specifications were as much a part of the ordinance as if they had been set forth therein in detail. As the ordinance itself provided that all of said sewers of twenty-one inches or less in interior diameter should be constructed of vitrified clay pipe, and all of said sewers two feet or more in interior diameter should be constructed of hard burned brick laid in hydraulic cement mortar, it is obvious that the dimensions of the sewer pipe and the material of which it was to be constructed were prescribed by the ordinance, and were not left to the discretion of the city engineer. The counsel for the defendants candidly admitted that much when the ordinance was introduced, but confined himself to the

objection that the thickness of the pipe was not sufficiently designated. It is to be observed that the answer makes no point in regard to the thickness of the sewer pipe, and the declarations of law asked by the defendants present no such issue to the circuit court, and that court was not asked to pass upon that question either in an exception to the ordinance and the specifications, when offered, or in the declarations of law. And yet it is now insisted that the whole proceeding is void because the ordinance itself did not fix the thickness of the sewer pipe. The evidence discloses that the contract and specifications were prepared before the letting of the work was done and the contractor, Ford, testified that when he went to the office of the city engineer to bid on the work, he found the specifications and plans and the profiles. It also appears in evidence that the contract to be executed by the successful bidder was also prepared and was on file for the inspection of the bidders before the bidding was done. The contract entered into in this case by Ford provided that "the pipes shall be straight, smooth and evenly burned, thoroughly sound and vitrified, well glazed, free from lumps or other imperfections, of uniform quality and thickness, and shall not vary more than one-half inch from a true circle. The thickness shall be of twelve inch pipe, not less than one and one-eighth inches; of fifteen inch pipe not less than one and one-fourth inches, and of eighteen inch pipe, not less than one and one-half inches, and of twenty-one inch pipe, not less than one and three-fourths inches." Not only did Mr. Harper, who had been in the office of the city engineer for twelve years, and Mr. Ford, the contractor, testify that the specifications and contract were prepared before any steps were taken for advertising for bids, but the contract on its face shows that the contract and specifications were embodied in the same instrument and it was on these specifications and this contract that the bid was

made. The evidence further tends to show that it had been the uniform custom and practice to use but one character of sewer pipe for sewers of this dimension during the twelve years, and that was that it should be double strength vitrified pipe. So far then as the thickness of the sewer pipe is concerned, there was ample evidence that it was specifically named in the specifications and there is no pretense that the contractor bid on double strength sewer pipe, and put in an inferior quality. In view of the decisions of this court in *Sheehan v. Gleeson*, 46 Mo. 100, and *City of St. Joseph to use v. Owen*, 110 Mo. 445, we are of the opinion that the neglect to describe the thickness of the sewer pipe in the ordinance does not and should not invalidate this contract, especially so in view of the fact that the circuit court was not asked to declare the proceedings void because the thickness of the sewer pipe was not specified.

The remaining point under this exception is as to the masonry. As to this proposition the answer relies upon the failure of the ordinance to prescribe the length and quantity of masonry required to support the brick portion of the sewer. The ordinance did not specify the amount of the rubble masonry to be furnished, but the plans showed where the construction would require the sewer to be built above the surface, showing the courts and side protection of masonry and the way the drain should be put to keep the water from going under the sewer. The engineer testified that the amount of masonry could not be definitely stated, an estimate only could be made, and the price per yard. In this case it was estimated it would require five hundred yards, but the final measurement after the sewer was completed showed it amounted to 850.4 yards. The engineer testified that it was impossible to know in advance how much masonry would be required. The actual condition after digging into the ground would alone disclose that. Often they would run into soft

places, which the surface indications would not disclose. The country through which the sewer was to be constructed was very rough. In some places the sewer was necessarily built out of the ground, in order to get the proper grade and not make the depth of the sewer in other places expensive, and in places it was necessary to put in masonry to support the sewer. All that could be done in advance was to give the correct length and location of the sewer and provide for the excavations and character of the sewer and estimate the cost and fix the price at which the work should be done. To hold that it was necessary to state exactly the amount of such masonry in the ordinance or the specifications would be to hold that a sewer could never be lawfully constructed in Kansas City with its hilly, broken surface. The law is not so unreasonable. The profile was made after an actual survey and the length of the sewer definitely described and proper estimates for those conditions which would only be revealed when the ditch was dug and the nature of the ground ascertained. Clearly there was no error in refusing the declaration of law that the whole bill was void even if there had been an amount of such masonry used in excess of the contract requirement. The defendants under the charter would only have been entitled to a credit for all in excess of the contract. [Quest v. Johnson, 58 Mo. App. 58.] But the circuit court found there was a substantial compliance with the charter, ordinance, and the contract and we find nothing to justify us in interfering with its finding.

VII. The circuit court ordered the judgment should bear ten per cent interest. As the defendants failed to pay the taxbill when due, the charter allows ten per cent, and by section 18, article 9, of the charter, the judgment, exclusive of costs, shall bear interest at the same rate as the taxbill.

After a careful consideration of this record, we are

of the opinion that the judgment was for the right party and that there is no reversible error in the case. The judgment is accordingly affirmed. All concur.

THE STATE ex rel. HENRY B. SMITH, Appellant,
v. THE MAYOR and BOARD OF ALDERMEN
of the City of Neosho, Namely: PRETTYMAN,
Mayor, and PICKENS et al., Aldermen, Appel-
lants.

In Banc, March 30, 1907.

1. **CONSTITUTION: Construction: City Indebtedness.** The Missouri Constitution was framed by plain men. Its language is plain, its purpose is plain; and it is the duty of courts not to subject its words to any over-nice or extraordinary gloss. When the thing done (for instance, the incurring of a debt by a city) was substantially that which was prohibited, it falls within the constitutional inhibition, simply because according to the true construction thereof, it falls within the thing prohibited.
2. ———: ———: ———: **Indirectly.** The incurring of indebtedness by a city beyond the maximum amount fixed by the Constitution is absolutely and unqualifiedly prohibited, no matter what the necessity, pretext or circumstance may be, or the form which the indebtedness is made to assume. The constitutional limit binds the courts, the General Assembly, the officials of the city and the people themselves. The city cannot do in an indirect or circuitous manner that which the Constitution has prohibited or enjoined it from doing directly.
3. ———: **City Indebtedness: Scaling Debt: Indivisible Contract.** Judicial power cannot scale a city debt down to a constitutional limit. Where the ordinance, by which the city issued bonds for the purchase of a waterworks plant and provided for the operation of the plant by the city and the payment to the owners of a stated net sum and in addition semiannual installments for a period of years, was one and an indivisible contract, if the debt thereby incurred is invalid because in excess, in the aggregate, of the maximum limit of five per cent, then the whole debt is invalid; in other words, if the semiannual installments are debts, and when they are added to the bonds

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(which of themselves are within the constitutional limit) the whole indebtedness exceeds the maximum limit, then the courts cannot declare the semiannual installments invalid, and the bonds valid.

4. ———: ———: **What is?** The word debt, in the sense the words "indebted" and "indebtedness" are used in the Missouri Constitution, means a promise by the municipality, grounded in a valid consideration, to pay to some person a sum of money now due and payable, or to become due and payable at a future date—an obligation resting on the debtor to pay, with a correlative right in the creditor to enforce payment.
5. ———: ———: **Contract: Double Intendment.** Whenever the words of a contract may have a double intendment, and the one agrees with law and the other is against the law, the intendment that agrees with law will be taken. The presumption is in favor of the legality of the contract. The law does not assume an intention to violate the law, nor will a contract be adjudged to be illegal where it is capable of a construction that will uphold it and make it valid.
6. ———: ———: ———: **Waterworks: Purchase: Bonds: Semiannual Installments: Payment Out of Particular Fund.** A city which could legally create an indebtedness not exceeding \$30,000, was authorized by ordinance approved by the voters in 1899 (by way of compromise of previous judgments and debts which the city owed a water company for hydrant rentals amounting to \$25,000 and liable in the future to amount to a much larger sum) to issue \$25,000 in bonds and acquire an existing waterworks plant, worth, including the judgment, etc., \$46,000, by paying \$25,000 cash therefor, and to receive all water rentals from consumers and pay the company out of the rentals so received \$875 semiannually for twelve years, or \$21,000, and if the city failed to pay the installments the company could temporarily take charge of the plant and receive the rentals until the installments then due were paid. *Held*, that the semiannual installments were not a debt, and that the bond issue was valid, and the contract (or ordinance) binding. The contract provided for a special or particular fund for the payment of the installments, without resorting to the power of public taxation, while the bonds were to be paid by means of taxation, and hence the debt to be paid by means of taxes was \$25,000.

Held, by Woodson, J., in a separate opinion, that the whole \$46,000 was a debt, but as the city under a prior valid ordinance had obligated itself to pay annually to the water company \$3,050 as hydrant rentals and had defaulted therein to the amount of \$25,000 at the time the compromise ordinance was adopted and would have been liable

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in an amount equal to \$61,000 on that account had the original ordinance continued in force until the end of the twenty-year period covered by it, and that obligation was renewed in the compromise ordinance, the sum of \$46,000 which the city by the compromise ordinance agreed to pay was not a new indebtedness, but a settlement of an existing indebtedness, and the Constitution containing no inhibition against the levy of a tax to pay a valid existing indebtedness in excess of five per cent of the value of the city property, the whole debt was valid.

7. CITY: Trustee of Special Fund: Mandamus. Where the city as a trustee of a special fund has accumulated that fund and holds it, it may be restrained from using it for any other purpose, and compelled by *mandamus* to turn it over to its owner. And where a city undertook to collect water rentals from a waterworks plant which it had bought from plaintiff's assignor, and to pay for it in semiannual installments out of water rentals for private water service, it will be compelled to use that fund to pay the installments.

Held, by Woodson, J., in a separate opinion, that the obligation of the city to pay the hydrant rentals having been determined to be valid by prior decisions of this court, and that obligation being renewed in the compromise ordinance by which the city agreed to operate the plant itself and pay the company semiannual installments, those installments were but a continuation of the original obligation, and the city can be compelled by *mandamus* to pay them. *Held*, also, that *mandamus* will lie notwithstanding plaintiff's claim has not been reduced to judgment. The validity of the rentals was litigated in the prior suits.

Appeal from Newton Circuit Court.—*Hon. Henry C. Pepper*, Judge.

REVERSED AND REMANDED (*with directions*).

Horace Ruark and John T. Sturgis for defendants-appellants.

(1) "Mandamus is strictly a legal remedy with which equity has nothing to do." 2 Spelling, Extraordinary Relief, sec. 1363; 19 Am. and Eng. Ency. Law (2 Ed.), 718, 731; State ex rel. v. Lewis, 76 Mo. 380. (2) In the contract in question the agreement to make payment of the semiannual installments is unconditional

and the date of payment and the amount to be paid are fixed with certainty—thus constituting a debt for the entire amount within the meaning of article 10, section 12, of the Constitution. The debt is absolute—there is no condition precedent, no service to be performed or supplies furnished. *Saleno v. City of Neosho*, 127 Mo. 627; *City of Ottumwa v. Water Company*, 119 Fed. 315; *City of Laporte v. Gamewell Fire Alarm Co.*, 146 Ind. 466; *Farles v. Wells*, 94 Wis. 285; *Valparaiso v. Gardner*, 97 Ind. 1; *Brown v. City of Corry*, 175 Pa. St. 528; *Brown v. City of Boston*, 179 Mass. 321; *Windsor v. City of Des Moines*, 110 Iowa 175; *Walla Walla v. Water Co.*, 172 U. S. 1; *Reynolds v. City of Waterville*, 92 Me. 292; *Culberson v. Fulton*, 127 Ill. 30; *Scott v. Davenport*, 34 Iowa 208; *Hall v. Cedar Rapids*, 115 Iowa 199; *City of Helena v. Mills*, 94 Fed. 919; *Doon Twp. v. Cummins*, 142 U. S. 366; *Spellman v. Parkersburg (W. Va.)*, 14 S. E. 279. It makes no difference that the debt sued for is the result of a compromise of a claim in favor of the Water Company on a liability which might accrue against the city. *Austin v. McCall (Tex.)*, 68 S. W. 791. And being in excess of the limitation provided by the Constitution, the entire indebtedness is void and cannot be enforced in any form of action at law or equity. *Prickett v. Marcelaine*, 65 Fed. 469; *Thornburg v. School District*, 175 Mo. 12; *Buchanan v. Litchfield*, 102 U. S. 278; *City of Litchfield v. Ballou*, 114 U. S. 192; *Gamewell Fire Alarm Co. v. Laporte*, 96 Fed. 664, 102 Fed. 417; *Lake County v. Rollings*, 130 U. S. 662. (3) The judgment in case of *Matters et al. v. City of Neosho* is not *res judicata* upon the issues herein. Relator was not a party to that proceeding nor bound thereby. Neither are the issues in this case the same as in the *Matters* case. (a) In order for a judgment to be binding in favor of any person it must also be binding against him. The judgment or decree must conclude both parties or it will conclude neither. The estoppel must be mutual. No

person can avail himself of a judgment as *res judicata* in his favor who has not shared the trouble or expense of a trial nor exposed himself to the hazard of an adverse decision. 1 Greenleaf on Ev. (16 Ed.), secs. 523 and 524; 24 Am. and Eng. Ency. Law (2 Ed.), 730; 1 Freeman on Judgments (4 Ed.), sec. 159; 1 Van Fleet's Former Adjudication, p. 111; State ex rel. v. St. Louis, 145 Mo. 565; Lyons v. Cooledge, 89 Ill. 529; Woods v. Henry, 77 Mo. 277; St. Louis Ins. Co. v. Cravens, 69 Mo. 77; State ex rel. v. Barker, 26 Mo. App. 494; Mail v. Maxwell, 107 Ill. 554; Allred v. Smith, 135 N. C. 443; Peebles v. Pate, 90 N. C. 348; Starkie on Evidence, 332; Coke on Littleton, 252. The owner of municipal bonds or other obligations to pay is not bound by a judgment in a suit by taxpayers against the municipality or its officers to which such owner is not a party. Town of Pana v. Bowler, 107 U. S. 529; Morrill v. Smith County (Tex.), 33 S. W. 899; 2 Van Fleet, Former Adj., sec. 570; Town of Lyons v. Cooledge, 89 Ill. 529; Mail v. Maxwell, 107 Ill. 554; Carroll County v. Smith, 111 U. S. 556; Warren County v. Marcy, 97 U. S. 96; Town of Enfield v. Jordan, 119 U. S. 680. (b) And the parties must also have occupied adversary positions during the trial upon issues formed between them by the pleadings. 24 Am. and Eng. Ency. Law (2 Ed.), 731; 1 Freeman on Judgments (4 Ed.), sec. 158; 1 Van Fleet's Former Adj., sec. 256; State Bank v. Bartle, 114 Mo. 281; Carmody v. Herrick, 85 Mo. App. 659; McMahan v. Geiger, 73 Mo. 145. (c) Relator was not only not a party in the Matters case but would not have been a proper party to that proceeding and could not have been joined as a relator and adversary party to the city. State ex rel. v. Fraker, 166 Mo. 142; State ex rel. v. Burkhardt, 59 Mo. 75. The issues involved in the Matters case did not concern the public as a whole, but only the taxpayers of the city by and for whom the suit was prosecuted (relator Smith is shown to have been neither a taxpayer nor a resident of the city).

Where a suit is brought by a few on behalf of a class the decree binds the entire class having a common interest, but does not bind those not belonging to the class and not having a common interest with those prosecuting it, so that the Matters judgment was not binding on relator Smith. 24 Am. and Eng. Ency. Law (2 Ed.), 758. (d) The proceedings in the Matters case were not *in rem*. At the time of the institution of that action there was no *res* in existence to seize. At most it was a proceeding to create a fund. There was no seizure into the custody of the court and there was no published notice to all the world. These are the distinguishing features of a proceeding *in rem*. Waples on Proceedings *in rem*, secs. 2, 41-42 and 43; Herman on Estoppel and Res Adjudicata, 304; Town of Pana v. Bowler, 107 U. S. 529. In order for a proceeding *in rem* or *quasi in rem* to be binding upon all the world as *res judicata*, notice of the proceeding must be published to the world and an opportunity afforded anyone to appear and defend. Such proceedings only bind the world when all the world is made a party by published notice. Waples on Proceedings *in rem*, secs. 64, 625-628; Herman on Estoppel and Res Adjudicata, sec. 219; Cooley's Constitutional Limitations (7 Ed.), p. 580; Troyer v. Wood, 96 Mo. 480; Hunt v. Searcy, 167 Mo. 158; Jones v. Yore, 142 Mo. 38; State ex rel. v. Hadlock, 52 Mo. App. 297; Woodruff v. Taylor, 20 Vt. 65; Scott v. McNeal, 154 U. S. 34; State v. Burton, 47 Kan. 44. (e) This suit is not for the same cause of action as the Matters case. No claim was made in the Matters case by pleadings, or otherwise, that the contract was void because a debt was created in excess of the constitutional limitation. Garland v. Smith, 164 Mo. 22. (f) The fact that the State is a nominal party both in the Matters case and the present suit is without force. The alternative writ in mandamus, which under our law is the first pleading, must, like all writs, run in the name of the State. The

use of the name of the State or sovereign is merely nominal and the suit is "regarded as in the nature of an action by the person in whose favor the writ is granted." *State v. Burton*, 47 Kan. 44; *State ex rel. v. Lewis*, 76 Mo. 380; *State v. Stock*, 38 Kan. 154; *Kimberly v. Morris*, 87 Tex. 637; 2 *Spelling, Extraordinary Relief*, secs. 1364, 1623; 13 *Ency. Pl. and Pr.*, 669 and 670. Proceedings for a writ of mandamus are civil proceedings, the State being merely a nominal party. 2 *Ind. (2 Cart.)* 423. And in many jurisdictions the state is not even a nominal party. *Rider v. Brown (Okla.)*, 32 *Pac.* 341; *Heinz v. Moulton*, 7 *S. D.* 272; *State v. Bates (S. C.)*, 24 *S. E.* 755; *Malain v. Judge Third Dist.*, 29 *La. Ann.* 793; *Kimberly v. Morris*, 87 *Tex.* 637. (4) The doctrine of estoppel cannot be applied to validate a contract which the corporation had no power to make. *Thornburg v. School Dist.*, 175 *Mo.* 12; *Wheeler v. Poplar Bluff*, 149 *Mo.* 46; *State ex rel. v. Murphy*, 134 *Mo.* 567; *City of Unionville v. Martin*, 95 *Mo. App.* 38; *Book v. Earl*, 87 *Mo.* 246; *Walcott v. Lawrence Co.*, 26 *Mo.* 272; *City of Litchfield v. Ballou*, 114 *U. S.* 192; *Bigelow on Estoppel*, 466; 20 *Am. and Eng. Ency. Law (2 Ed.)*, 1182; *Buchanan v. Litchfield*, 102 *U. S.* 278; *State ex rel. v. Helena*, 24 *Mont.* 521; *French v. Burlington*, 42 *Iowa* 617; *Laporte v. Gamewell Fire Alarm Tel. Co.*, 146 *Ind.* 466; *Gamewell Fire Alarm Co. v. Laporte*, 96 *Fed.* 664, 102 *Fed.* 417. (5) No recovery can be had in this case based on any claim arising under ordinance No. 113. That ordinance was repealed by ordinance No. 232, to which plaintiff's assignor gave its assent. By ordinance No. 232 an entirely new contract was substituted for No. 113. (a) Relator having brought suit upon ordinance No. 252 cannot recover under the provisions of ordinance No. 113 and the judgment rendered thereon. He cannot sue upon one cause of action and recover upon another. *Stix v. Matthews*, 75 *Mo.* 96; *Hollman v. Lange*, 143 *Mo.* 100; *Cole v. Armour*, 154 *Mo.* 333. (b) The ob-

ligation to pay under ordinance No. 113 is a general one and no special fund provided. Before resort can be had to mandamus, a party must first establish the validity of his claim in an action at law. *Mansfield v. Fuller*, 50 Mo. 338; *Cloud v. Pierce City*, 86 Mo. 357; *Payne v. School Dist.*, 87 Mo. App. 415. (c) The deed from Neosho City Water Company to the city carried with it all rents subsequently accruing and *ipso facto* ended the obligation of the city to pay water rentals. *Culverhouse v. Whorts*, 32 Mo. App. 419; *Vaughn v. Locke*, 27 Mo. 290; *Latta v. Weiss*, 131 Mo. 230; *Page v. Culver*, 55 Mo. App. 606.

Thurman, Wray & Timmonds and *George Hubbert* for plaintiff-appellant.

(1) The money having arisen out of the compromise contract, from the use of the property turned over by the company to the city, in which a beneficial interest was clearly reserved by the company; and the money being so made available, and under the immediate control of the city, for application as the installments matured, by the simple act of drawing an appropriate warrant—there was no contracted debt in the contemplation of the constitutional prohibition. 1 *Dil. Mun. Corp.*, sec. 135. Where there is provided, as there is here, by reasonable stipulation and arrangement, a particular fund, without necessity for resort to the power of public taxation against the assessable property of the municipality, out of which special fund the obligation for current or continuing uses of property, services or supplies, may be satisfied as they arise, there is no debt contracted, within the constitutional or statutory inhibition against contracting debts beyond specified limitations relating to property values or without concurrent provisions for payment. *Winston v. City of Spokane*, 41 *Pac.* 888; *Simile v. Fresno Co. (Cal.)*, 44 *Pac.* 556; *Donahue v. Morgan (Colo.)*, 50 *Pac.* 1038; *Faulkner v. City of Seattle*

(Wash.), 53 Pac. 365; *City of Valparaiso v. Gardner*, 97 Ind. 149; *Fort Dodge Co. v. Fort Dodge*, 115 Iowa 568; *Swanson v. Ottumwa*, 91 N. W. 1048; *Fidelity v. Fowler*, 113 Fed. 560; *Laporte v. Gamewell (Ind.)*, 58 Am. St. Rep. 359; *Wade v. County*, 174 U. S. 499; *Winston v. Fort Worth*, 47 S. W. 740; *McNeil v. Waco*, 33 S. W. 322; *Fourth Natl. Bk. v. City of Dallas*, 73 S. W. 841; *Mitchell County v. City Natl. Bk.*, 91 Tex. 841; *Brockenbrough v. Board of Charlotte*, 46 S. E. 28; *Doland v. Clark*, 143 Cal. 181; *Sackett v. New Albany*, 88 Ind. 473. (2) But the city should be held estopped, and not be permitted to repudiate its own law as enacted by ordinance 232, after having used said law to acquire the possession and earnings of the waterworks for its own advantage. It is well settled, as a general proposition, that, "where a party has availed himself of an unconstitutional law for his own benefit, he cannot, in subsequent litigation with others, aver its unconstitutionality as a defense." *Daniels v. Tearney*, 102 U. S. 415; *Vickery v. Board of Comrs.*, 134 Ind. 556; *Purcell v. Conrad*, 84 Va. 573; *Willis v. Board of Comrs.*, 86 Fed. 876; *Arthur v. Israel*, 15 Colo. 153; *Folger v. Clark*, 80 Me. 242; *Butler v. Ellerbe*, 44 S. C. 269; *Davis v. Wakelee*, 156 U. S. 691; *State v. Martin*, 103 Mo. 512; *O'Brien v. Wheelock*, 184 U. S. 450; *St. Louis v. Davidson*, 102 Mo. 155. The relations of a fourth class city to the subject-matter of such contracts as we have here, is that of a contracting and business proprietary, dealing with the waterworks plant for its own private advantage, and the rule is to exact of such a city the performance of its obligations under its contracts, after the manner of dealing with private individuals or corporations. *State ex rel. v. St. Louis*, 145 Mo. 572; *Water Co. v. Aurora*, 129 Mo. 583; *Neosho City Water Co. v. City of Neosho*, 136 Mo. 505; *Lamar W. & L. Co. v. Lamar*, 140 Mo. 145. (3) The objects and terms of the contract, properly understood, are not obnoxious to the Constitution.

And if necessary to a proper understanding of it, resort may be had to the fundamental rules of construction in such cases. Any question as to the true meaning or purpose of the parties, i. e., whether within or without the prohibitions of the laws, should be resolved, in case of doubt, in favor of the contract as a valid obligation. It must be assumed, to start with, that the parties intended, not to violate, but to refrain from the violation of the law. And that intention will account for the diverse and severable stipulations in the ordinance; and such intention is entitled to the first consideration of the court. Bishop on Contr., secs. 460, 420, 417; Jones on Construction of Contract, 224-6; 1 Beach, Contr., sec. 717. The reference in ordinance 232 to the previous ordinance, the judgment against the city, etc., make the same undoubted parts of the contract under consideration; and all the papers, deeds, resolutions and documents pertaining to the matter, and contemplated by the parties as effecting some part of the compromise agreement, must be taken as constituent parts of the existing contract. 1 Beach, Contr., secs. 706, 713; Jones on Constr. Contr., 213. (4) The judgment in the mandamus case of State ex rel. v. Matters et al., in pursuance of which the money is appropriated to, and held in the city treasury for the payment of the hydrant rentals, now reduced to \$1750 per year, fixes the status of the fund in question, and so binds the defendants in their dealings with it and duty towards the same; and relator is entitled to have payment thereof as assignee of the Water Company. State ex rel. v. Trammel, 106 Mo. 520; State ex rel. v. Rainey, 74 Mo. 229; Harmon v. Public Works, 123 Ill. 122; State ex rel. v. Rainey, 74 Mo. 229; City of N. O. v. Bank, 167 U. S. 371; Bear v. Board of Comrs., 122 N. C. 434; Ashton v. City, 133 N. Y. 187; Gallaher v. City, 34 W. Va. 730; Sauls v. Freeman, 24 Fla. 209; Cannon v. Nelson, 83 Iowa 242;

McIntosh v. City, 112 Fed. 705; Holt Co. v. Natl. Life Ins. Co., 80 Fed. 686; Home Co. v. Mayor of City (Ky.), 68 S. W. 15. (5) Mandamus is the remedy to enforce the performance of the duty of the municipality and its officers relating to the payment of a private claim out of a specially provided or authorized fund; and resort of the relator to ordinary action was not necessary or proper. State ex rel. v. Adams, 161 Mo. 365; Moody v. Cass County, 74 Mo. 307; Campbell v. Polk Co., 49 Mo. 214; Kingsberry v. Pettis Co., 48 Mo. 207; Pettis Co. v. Kingsbury, 17 Mo. 479.

Horace Ruark and John T. Sturgis for defendants-appellants in reply.

(1) That the semiannual payments in question are not payable solely and exclusively out of the water rentals but do constitute a general promise to pay and liability of the city, we thought too plain a proposition for argument or citation of authorities. As relator seems yet to contend the contrary, we cite a few cases to the proposition that unless the municipal obligation clearly and unmistakably limits the payment to a special fund and excludes general liability, the obligation will be held to be general with the special fund as additional security. Fowler v. Superior, 85 Wis. 411; Tiedeman, Municipal Corp., sec. 194a; Merrell v. Monticello, 22 Fed. 594; Bank v. Evansville, 25 Fed. 391; Avery v. Job, 25 Oregon 520; Martin v. Tyler (N. Dak.), 60 N. W. 400; Redmon v. Chacey (N. Dak.), 73 N. W. 1081; Kimball v. Board of Com., 21 Fed. 145; 21 Am. and Eng. Ency. Law (2 Ed.), 79; Clark v. Des Moines, 19 Iowa 199 (cited with approval in International Bank v. Franklin Co., 65 Mo. 113); U. S. v. Clark County Court, 96 U. S. 211; Darlington v. Trust Co., 78 Fed. 596. (2) The Supreme Court of Indiana has passed on every phase of this question of what annual payments constitute a debt in the ag-

gregate within the meaning of a constitutional provision the same as ours. It was one of the courts, *Valparaiso v. Gardner*, 97 Ind. 1, which announced the doctrine followed by this court in *Saleno v. Neosho*, 127 Mo. 641, that a contract for annual supplies to be furnished for a series of years and to be paid only as furnished, was not a debt in the constitutional sense for the total of the annual payments. It has also defined and applied the special fund doctrine, *Straib v. Cox*, 110 Ind. 299, limiting it to cases where the obligation is payable solely and exclusively from a special fund "and from no other source" so that in no event is the municipality liable. Yet this court upholds by its later decisions, not impairing the others, however, in all its vigor the doctrine now contended for by defendant, that whenever the installments to be paid are in the nature of purchase money, the payments being fixed and certain to come due and not dependent on supplies to be furnished or services to be rendered, then such installments are a debt for the total amount within the meaning of the constitution. *Laporte v. Fire Alarm Co.*, 146 Ind. 466; *Voss v. Waterloo (Ind.)*, 71 N. E. 208; *Quill v. Indianapolis*, 124 Ind. 292; *Valve Co. v. Crown Point*, 76 N. E. 536. The Supreme Court of Iowa has likewise considered the three phases of this question under its constitutional provision identical with ours. *Dively v. Cedar Falls*, 27 Iowa 227; *Hall v. Cedar Rapids*, 115 Iowa 199; *Windsor v. Des Moines*, 110 Iowa 175. So the Federal courts early adopted the doctrine followed in the *Saleno* case. *Budd v. Budd*, 59 Fed. 735; *Water Co. v. Walla Walla*, 60 Fed. 957. But those courts have very greatly restricted, if not totally repudiated, the special fund doctrine. *Ottumwa v. Water Co.*, 119 Fed. 315. And maintain with special vigor the doctrine contended for by defendants. *Walla Walla v. Water Co.*, 172 U. S. 1; *Helena v. Mills*, 94 Fed. 916. The courts of Illinois announced the doctrine ap-

plicable to contracts for annual supplies of water, light, etc., as followed in the Saleno case. *Water Co. v. Carlyle*, 31 Ill. App. 339, 140 Ill. 445. It has confined the special fund doctrine to the narrowest limits and upheld the doctrine contended for by defendants under contracts more doubtful in their terms than the one at bar. *Joliet v. Alexander*, 194 Ill. 497; *Springfield v. Edwards*, 84 Ill. 632; *Culbertson v. City of Fulton*, 127 Ill. 30. The difference between a contract for supplies or services to be furnished for a period of years, the payments being dependent on the supplies or service being furnished, in which case the contracted payments are not debts till the supplies or service are so furnished; and a contract of purchase providing for future payments in which the debt is a present one though payable in the future, is so well settled as to leave discussion useless. *Reynolds v. Waterville (Me.)*, 42 Atl. 557; *Crogster v. Bayfield County (Wis.)*, 74 N. W. 635.

LAMM, J.—Relator, Henry B. Smith (hereinafter called plaintiff), sued out an alternative writ of mandamus in the circuit court of Newton county against the mayor and board of aldermen of the city of Neosho, whereby respondents (hereinafter called defendants) as such officers, were commanded to forthwith issue and deliver, or show cause why they have not issued and delivered, warrants in lawful form upon the treasurer of said city, requiring him to pay certain semianual installments of \$875 each, to said Smith out of a certain fund created by the earnings and revenues of its waterworks, subsequently to 1900, arising from paid water service to private consumers. On issue joined by the reply to the return to said writ, the alternative writ of mandamus was made peremptory, but for a less amount than set forth in the alternative writ.

Defendants complain that any relief was granted,

i. e., that the relief was too great. Plaintiff complains that more relief was not granted, *i. e.*, that the relief was too small. On cross-appeals, with a joint bill of exceptions, both parties bring the case here for review.

A judgment below was entered on May 5, 1904. It seems that pending the suit two of the defendants, to-wit, Pickens and Sims, had gone out of office as aldermen and Ed Rathell and E. E. Carnes had been elected and installed as their successors; and, further, that the term of office of Charles E. Prettyman as mayor had expired, and J. W. Lamson had been elected and inducted into the office of mayor. In view of these official changes, on the motion of plaintiff, and prior to the rendition of judgment, the foregoing newly-elected and qualified officers were substituted as defendants in place of their said predecessors.

Neosho is a city of the fourth class. In the region around about that historical town is a spring called the Clark Spring, or Big Spring. It may be inferred from certain narrations in an ordinance (presently to be considered) that one Clark owned this spring and held a permit to lay pipes in one or more streets of Neosho to furnish water to its inhabitants therefrom. Be that one way or the other, there is another spring, known locally as the Elm Spring, some five and one-half miles from the city; and in September, 1890, one Saleno, a resident of Bay City, Michigan, was granted a franchise to furnish water to Neosho from the Elm Spring, through wooden pipes, called "improved Wykoff pipes" and a plan known as "gravity pressure."

The Saleno franchise and contract are set forth in an ordinance known as No. 113. The caption of that ordinance is as follows: "Ordinance No. 113. An ordinance providing for a supply of water to the city of Neosho, Missouri, authorizing S. V. Saleno to construct and maintain and operate waterworks, contracting with him for a supply of water for public use and giv-

ing said city an opportunity to purchase said works."

By section 1 of the ordinance there was "given and guaranteed" to said Saleno and his assigns for twenty years from the date of the adoption of the ordinance the exclusive right and privilege of supplying the city of Neosho and its inhabitants with water.

By section 2, Saleno and his assigns were authorized to establish, construct, maintain and operate waterworks in the city of Neosho, to receive, take, store, purify, conduct and distribute water through the city and construct and maintain mains and pipes through the streets, alleys, lanes, public grounds and across streams and bridges in said city and to maintain engines and other appliances necessary for the conduct and carrying on of such works, etc.

Section 3 provides that the board of aldermen would accept a named source of water supply as sufficient in quality, quantity and pressure, when furnished through a ten-inch pipe up to the corporate limits. This section further sets forth the required pressure, the character of pipe to be used and directs where one main should be laid. It specifies the internal diameter of and provides for additional pipes as the board of aldermen from time to time direct, subject to the condition that one fire hydrant should be ordered for every four hundred feet of additional pipe.

Section 4 provides for the character of fire hydrants and sets forth that for the first five miles of pipe laid there should be fifty hydrants erected at places designated by the board of aldermen.

Section 5 provides that the city should pay Saleno and his assigns an annual rental of \$2,000 for said fifty hydrants; and for all hydrants in excess of fifty, an annual rental of \$30 each—payments to be made semi-annually on the 1st day of January and July each year, and to commence when said waterworks be completed and accepted by the board of aldermen, and that said

payments continue for the full terms of twenty years unless the city in the meantime should become the owner of the works.

Section 6 provides that Saleno and his assigns might mortgage said franchise, rentals, and plant; and, in such case, a provision is made for the city to pay the interest on the bonded indebtedness out of said hydrant rental.

Section 7 sets forth what taxes were to be levied to carry out the ordinance purpose and out of what funds the hydrant rental and the interest on such mortgage should be paid.

Section 8 provides for installing water meters and sets forth in detail the meter rates to be charged for sundry sorts of water service.

The ordinance continues at great length through thirteen more sections to say that the city should pass an ordinance protecting the source of water supply from pollution and the waterworks property from injury; for the free use of water from hydrants to extinguish fires, and to flush gutters and sewers for sanitary purposes; for four free public watering places for domestic animals, and the free use of water for public schools and offices occupied for city purposes; for a test and acceptance of the works; for an option to purchase in one year after the completion of the works, or in any year thereafter, on an appraisement; that if the city did not purchase within the first twenty years, then the franchise should be extended for another term of twenty years with the same right of purchase as before; that the works should be completed by June, 1891; that the ordinance should become a binding contract on Saleno's acceptance of it; that the wilful and malicious injury of any of the fixtures or other property pertaining to said waterworks should be a misdemeanor; that Saleno might shut off the water temporarily for purposes of necessary repair; that the rights grant-

ed to Saleno were only such as the city now possessed or might hereafter possess, but the city was not bound to acquire rights for the use of Saleno, or pay any damages for property used or taken for the construction or maintenance of the plant. The right was further reserved to the board of aldermen to rescind and revoke the ordinance if the works were not completed in the time and manner prescribed. And if Saleno or his assigns without reasonable cause failed to comply with the provisions of the ordinance, then a plan for the annulment of the contract by a suit in a court of competent jurisdiction was provided. Saleno was to give bond for \$2,000 that he would comply with the contract. Finally, all ordinances and parts of ordinances inconsistent were repealed; and it was further provided that the right of Clark to deliver water to citizens from the Clark Spring, or Big Spring, was excepted from the Saleno grant, and Saleno's exclusive privilege was diminished thereby; but it was agreed that Clark would not be permitted to repair or extend his pipes or increase his capacity in any way or extend his pipes through streets or change their present location after the passage and approval of ordinance No. 113.

Saleno built and put in operation the waterworks system contemplated by the foregoing ordinance and, at a time not disclosed by the record, but presumably in 1891, completed the same; and the city accepted the works, and Saleno commenced furnishing water under his contract. Presently Saleno, plaintiff and divers others, organized a corporation with \$50,000 capital—50 per cent paid up—under the style and designation of "The Neosho City Water Company," and this corporation took over Saleno's water franchise and water plant and all his contractual rights under ordinance 113 and thenceforward stood in his shoes. At a certain time, not disclosed, additional pipe was laid and additional fire hydrants were erected, as provided by said

ordinance, until the total number of fire hydrants under rental by the city was eighty-five; and the annual rental was \$3,050. This rental under the ordinance scheme, as said, was to be paid semiannually out of the city's revenues and collected by taxation.

At a certain time thereafter a squabble arose, the city defaulted in the payments of its semiannual hydrant rental, and, thereupon, a long drawn out and bitter litigation sprang up—one suit following on the heels of another. Two of these cases came to this court, and others were tried, *nisi*, and not appealed, and still others were pending at the time the compromise (presently to be considered) was entered into between the warring parties. In a general way it may be said that the bone of contention between Saleno and Neosho, and between The Neosho City Water Company and Neosho, was the validity of Saleno's contract; and the binding efficacy of that contract was declared in two cases in this court (*Saleno v. City of Neosho*, 127 Mo. 627; *Neosho City Water Co. v. City of Neosho*, 136 Mo. 498—both in Banc), where the curious may learn with what zeal and skill the validity of ordinance 113 was assailed on one side and defended on the other. By the last of the above cases it was held that the provision for the renewal of the franchise for a second term of twenty years was not valid; but the validity of the franchise and contract for the first term of twenty years was again sustained; and, furthermore, plaintiff was held entitled to interest on defaulted semiannual payments of hydrant rentals. Both these cases held that the semiannual installments for the whole period must not be taken as aggregated in determining the present indebtedness of the city under the constitutional inhibition set forth in section 12, article 10—that the future installments of hydrant rental depended upon a condition precedent which might never be performed, and which installments of rental would not ripen into a

debt (within the constitutional purview) until such condition precedent was performed.

In 1895 the situation was so acute as to bespeak a serious attempt at compromise if both parties litigant were to avoid the distress of floundering in a bog of interminable hostility. Accordingly, compromise ordinance No. 7 was passed; but failed of adoption at an election called for that purpose, and may be put to one side. In the meantime a mandamus suit was instituted by the Neosho City Water Company in the circuit court of Barton county, resulting in the issue of a peremptory writ of mandamus against the city for a large sum.

The city was paying on this judgment, and possibly on others, in dribbling payments from existing revenues; and, on the 14th day of February, 1899, the unpaid portion of these judgments, together with the unpaid semiannual installments of hydrant rental not merged in judgment but covered by pending suits, amounted to a large sum. It is to be inferred, too, that on that date there was hydrant rental due which was not in suit. The exact amount of the unpaid accrued hydrant rental (whether merged in judgment, or in suit, or not in suit) cannot be determined with accuracy on the record here. Plaintiff contends that, with interest, the amount was so much as \$25,000. Defendants contend, and (considering the testimony) with great show of reason, too, that, taking note of the payments made and the fact that the whole number of eighty-five hydrants had not been in use from the very start, the amount did not exceed at most \$15,000, and was probably less than that. In the view hereinafter taken of this case it will not be necessary to determine and settle this disputed question of fact. Suffice it to say that, things having gone from bad to worse, on said 14th day of February, 1899, a scheme for a compromise was evidenced by an ordinance, No. 232, and again sub-

mitted to the people. Defendants insist there is no evidence in the record that this scheme was ever adopted at an election held in pursuance of the ordinance; but the pleadings, including admissions in the return of defendants, proceed on the assumption that an election was held and the compromise contract was duly ratified at such election. Not only so, but the whole case proceeded below on the theory that the scheme was ratified, and therefore, this court must adopt that theory on review.

Ordinance No. 232 is as follows:

“ORDINANCE No. 232.

“An ordinance to provide for the compromise of all matters of difference between the City of Neosho and the Neosho City Water Company arising out of the contract ordinance of the 22d day of September, 1890, numbered 113; and for the city of Neosho purchasing, taking over and operating the waterworks constructed under said ordinance; and for the satisfaction of the judgments and hydrants rental claims against the said city of Neosho in favor of said Neosho City Water Company; and for the securing a better fire protection and water service for the said city of Neosho and selling water to its inhabitants; and for the issue of twenty five thousand dollars (\$25,000) of interest bearing ten (10) twenty (20) (years) city bonds, and the levy of a tax for a sinking fund to pay the same; and for securing to the said Neosho City Water Company semi-annual installment payments, for twelve (12) years, of eight hundred and seventy-five dollars (\$875) each, for use of waterworks as a compromise measure; and for the repeal of said ordinance No. 113 so far as inconsistent with this ordinance.

“Be it ordained by the board of aldermen of the city of Neosho as follows:

“Section 1. That, with the assent of the voters of said city, by a two-thirds affirmative majority vote, at

the time hereinafter provided, the following contract is hereby authorized to be made, and the same may be accordingly certified by the mayor and clerk and authenticated by the seal of the city of Neosho, Missouri, as a final compromise contract with the Neosho City Water Company, as assignee of S. V. Saleno, viz: This contract is made in full compromise and settlement of all and every judgment, claim and demand against said city under ordinance No. 113, and it is agreed as follows:

“The Neosho City Water Company, as assignee of said S. V. Saleno, agrees to transfer, by proper legal conveyance, the title, possession and use of the entire system of waterworks, land, water springs, pipe lines, pipes, right of way, easements, franchises, hydrant, and all other property thereto belonging or used in operating the same, free and clear of any charge or incumbrance, to the city of Neosho, with the right to the city to operate and control the same, collect all rent or toll for supplying water to all persons whatsoever, and have and use, subject to the reservation hereinafter mentioned, all the proceeds and hydrant rental of said plant for a period of twelve (12) years from January 1, 1899, and release the city from all hydrant rental and liability relating to the same under the provisions of said ordinance No. 113, except as herein expressly provided; and in consideration thereof the city agrees to pay for the use, control and possession of said works the sum of \$875 every six months, on or before the first day of July and first day of January of each year for a period of twelve years, from January 1st, 1899, and in consideration of said payments and the payments of twenty-five thousand dollars for judgments and in full settlement of all claims and differences existing between said parties as in this ordinance provided, it is agreed and contracted that the city shall own said works absolutely, and it is further agreed that

the Neosho City Water Company, as the legal assignee of said S. V. Saleno, shall, on the day the twenty-five thousand dollars is paid to said company as herein provided, make out, execute and deliver a deed and conveyance in due and legal form assigning, setting over and conveying to said city the entire plant and waterworks system including land, water springs, right of way, pipe lines, pipes, hydrant, easements, franchises, and all other property of every kind belonging thereto, or used in connection therewith both real and personal, with all the office books for the use in continuing the service of water to private persons, free of all liens, charges and incumbrances, and will give a perfect title to the same to the city of Neosho.

“On the payment of the said sum of twenty-five thousand dollars by said city to said Neosho Water Company, all judgments and other indebtedness, except as herein provided, in favor of said Water Company and against said city shall be deemed fully paid and discharged, and said Water Company shall cause to be entered on the proper court records formal satisfaction of each and every such judgment and all suits of whatever nature now pending between said parties shall be dismissed, each party paying its own costs.

“Section 2. It is provided, however, that there shall be reserved to the said company for additional security for the payment of said sum of eight hundred and seventy-five dollars semiannually the following rights, viz: All earnings, proceeds and revenues arising from water service to private consumers for each and every successive period of six months during the continuance of the contract hereby authorized, to-wit, twelve years, shall not be used for any other purpose than to pay the semiannual installment of eight hundred and seventy-five dollars for such term for the use of the waterworks as herein provided until said payment is made; it being understood that all the rest,

residue and remainder of the said earnings and proceeds, after satisfaction of said semi-annual installment, shall be free for any legitimate use by said city; and it is further provided that if the said city fail to make payment for any six month's term as agreed herein for thirty days after the same is due, the said Water Company may take possession of the said works and operate the same and collect earnings from private consumers until all the unpaid installments be satisfied out of the same; and it is further provided and agreed that the city shall keep the said works in good condition and continue to serve its inhabitants and collect therefor substantially the same rates for water service as heretofore collected by the company for like services, until all of said indebtedness be paid.

"Section 3. That in payment of all present indebtedness, and part payment of the purchase of said waterworks system the city of Neosho shall pay the Neosho City Water Company the sum of twenty-five thousand dollars out of the proceeds of an issue of twenty-five thousand dollars of city bonds which are to be sold for not less than par value, said bonds to date March 23, 1899, be in denomination of five hundred dollars each, bearing interest at the rate of five per centum per annum from date, payable semiannually, with interest coupons attached to conform to the face of the bond, attested by the signature of the mayor of the city and the clerk thereof, and have affixed thereto the corporate seal of said city.

"Section 4. For the purpose of providing the means to pay the bonds provided for by this ordinance and interest thereon as the same falls due and accrues, there shall be levied and collected annually, in addition to the tax for ordinary purposes, a special tax of twenty-five cents on one hundred dollars valuation on all taxable property in the city; that said tax shall be separately levied and collected at the same time and

in the same manner as taxes are collected for general purposes, and when collected the same together with at least twenty per cent of the annual taxes levied for general purposes, which amount is hereby set apart and appropriated for such purpose, shall be and constitute a special fund for the specific purpose of paying interest on said bonds as the same become due and to constitute a sinking fund to pay the principal of said bonds as and when they mature, provided, however, that if there be raised and paid into such special and sinking fund for any year from license taxes, the ordinary revenue, or other sources, a sum equal to the said twenty-five cents on the one hundred dollars valuation of the taxable property, then the said special tax levy may be correspondingly lowered for such year.

“Section 5. That for the purpose of obtaining the assent of the legal voters of the city to this ordinance and the foregoing provisions thereof, a special election shall be held in the city of Neosho on the 7th day of March, 1899, at which said election this ordinance and proposition to authorize the said contract and to become indebted and to issue bonds for the payment of the indebtedness incurred and to levy annual taxes to pay the interest and principal of said bonds as above provided, shall be submitted to a vote of the qualified voters of the said city for ratification or rejection.

“Section 6. That all persons voting at said election in favor of said compromise contract and of this ordinance and of the increase of levy of the annual taxes and of incurring said indebtedness of twenty-five thousand dollars and of the issue of bonds for the payment thereof, all as above provided, shall deposit a written or printed ballot in the following form: For the ordinance and contract, the increase of debt, the issue of bonds and levy of taxes as proposed,—Yes.

“All persons voting at said election voting against the ratification of this ordinance, and of the increase

of levy of the annual taxes and of incurring said indebtedness, and issuing of bonds as herein provided, shall deposit a written or printed ballot in the following form: For the ordinance and contract, the increase of debt, the issue of bonds and levy of taxes as proposed,—No.

“Section 7. That the bonds mentioned in this ordinance shall be known as the Neosho Water Bonds and shall be numbered successively from one to fifty inclusive; said bonds shall be due and payable on the 23d day of March, 1919, but said city may at its option pay said bonds at any time after the 23d day of March, 1909.

“Section 8. At least fifteen days notice of said election shall be given prior to the date thereof by publication in some newspaper published in said city.

“Section 9. This ordinance shall be in force, for all purposes of notice and election and authority to execute its provision so far as practicable, from the day of its passage and approval, and thereafter effectual and in force in all other respects, only upon condition that two-thirds of the qualified voters of the city voting at the election held for that purpose vote in the affirmative upon the proposition hereby submitted, and the further preceding condition that the said Water Company shall file with the city clerk written acceptance of the terms of this ordinance, with authenticated resolution of board of directors of said company authorizing such acceptance, without which acceptance either before said election or within thirty days after the returns of said election shall have been canvassed and the results declared by the board, this ordinance shall have no further force or effect for any purpose; and it is further provided that upon the said two-thirds majority vote in the affirmative as above contemplated and the written acceptance hereof by the said Water Company as above required the said contract shall be

deemed as in full force without further formalities as of the date of January 1st, 1899.

"Section 10. All ordinance and parts of ordinances and especially the provisions of the said ordinance No. 113, so far as the same are contrary to or inconsistent with the provisions of this ordinance are hereby repealed.

"Passed by the board of aldermen of the city of Neosho, Missouri, this 14th day of February, 1899.

"J. F. SHANNON, Mayor.

"Attest,

"J. B. Robinson, City Clerk.

"Approved by the mayor this 14th day of February, 1899.

"(City Seal).

"J. F. SHANNON, Mayor."

Ordinance No. 232 was formally accepted by the Neosho City Water Company; and presently the bonds contemplated thereby were executed, put on the market and sold at par (\$25,000), plus a premium of \$1,685, and passed into circulation. Out of the proceeds \$25,000 were paid to the Neosho City Water Company as provided in section 3 of said ordinance; and on the 24th of day of April, 1899, the following deed (omitting signatures and acknowledgment) was executed:

"Know all men by these presents, that the Neosho City Water Company, incorporated under the laws of Missouri, in pursuance of the terms of contract embodied in ordinance No. 232 of February 14th, 1899, of the city of Neosho, in Newton county, Missouri, and for the sum of twelve thousand and five hundred dollars paid concurrently herewith does now and hereby grant, bargain, sell, set over, assign and convey unto the said city of Neosho a perfect title in and to all and singular the entire plant and waterworks system of the said company as located in, at and near the said city,

including all its lands, water springs, rights of way, pipe lines, pipes, hydrants, easements, franchises and all other property of every kind belonging thereto or used in connection therewith both real and personal with all the office books for use in connection with continuation of the service of water to private consumers or persons, the title to all which property, plant and works is now and hereby conveyed to the said city free and clear of all liens and encumbrances, a part of said lands being so much of the south half of the southeast quarter of section twelve, in township twenty-four of range thirty-two, and the south half of the southwest quarter of section seven in township twenty-four of range thirty-one in said county as the said company has heretofore exerted control over or asserted title to as a part of or appurtenant to the Elm Springs head or the company's reservoir site and pipe line connections excepting only water privileges of Rebecca McBee, L. B. McBee and Linnie McBee as now enjoyed by them.

“Witness the seal of the said company and the signature of its duly authorized officers, viz: Its acting president and secretary, its manager and agent, C. Basye, in pursuance of due resolution of the board of directors of the said company this 24th day of April, A. D. 1899.”

On the execution of the foregoing deed, the Neosho City Water Company satisfied its judgments, dismissed its pending suits for accrued installments of hydrant rental, treated all past hydrant rental as paid off, and turned into the possession of the city all its properties and property rights covered by the ordinance and deed, and the city began the performance of the contractual duties, enumerated in ordinance 232, not theretofore performed. In that performance, it turned over to the Neosho Water Company the \$875 semianual installments provided for July 1, 1899, January

1, 1900, and July 1, 1900. On January 1, 1901, it defaulted in the performance of the contract and has continued to this day in default.

It seems from the very beginning the city did not keep the earnings of the waterworks plant arising from water service to private consumers separate from its general revenue, but brought them all into hotch-pot on its books and dissipated those earnings by paying them on current obligations of this or that sort. In this condition of things one Matters (and others) brought a proceeding by mandamus in the Newton Circuit Court in their capacity as tax-paying citizens of the city of Neosho and against the mayor, the treasurer and board of aldermen of that city, the object of which was to prevent a commingling of the earnings of the water plant with the general revenues of the city and the consumption of those earnings in the payment of current obligations, and to compel the city to set apart the earnings and revenues of the water service arising from its sale of water to private consumers to subserve the purposes of the ordinance No. 232. On return being made to that writ a trial was had and a final judgment entered awarding a peremptory writ of mandamus, which judgment remains in full life, undisturbed by appeal, and is as follows:

“Now on this day comes both the relators and the defendants herein, and thereupon the return of the said defendants to the writ of alternative mandamus heretofore issued and the plea and the traverse of said relators to said return, are submitted to the court for trial, and the court having heard the evidence doth find the issues formed in favor of said relators, and that said defendants have not shown any just cause why a peremptory writ of mandamus shall not issue to them, the said defendants, as prayed by said relators, and that the said defendants have made a false return to said writ. Whereupon it is by the court con-

sidered and adjudged that a writ of peremptory mandamus be issued to the said defendants, to-wit: Chas. E. Prettyman, mayor, and W. C. Price, treasurer, of the city of Neosho, and J. Pickens, R. L. Wills, R. H. Robinson, W. E. Sims, J. S. Rowe and Frank Taiclet comprising the board of aldermen of said city and to each of them, directing them and each of them as such officers of said city to set apart and keep on hand in the city treasury of said city at least \$875 each six months out of the earnings arising from water service to private consumers, as collected by said city for each and every year inclusive of the year 1903, unless the semiannual payments of \$875 each be paid to said Water Company as and when such payments become due. And that said relators have and recover their costs and charges in this behalf expended and have thereof execution."

On the aforesaid judgment being entered, the city fully complied with the same to the letter, and went further and took out of its general revenues and set aside enough money to cover all semiannual installments in default prior to 1903. It seems that during the term of these defaults the income from the waterworks had been more than sufficient to meet the installments aforesaid; and as this income had been used for current city expenses, the general revenues were drawn upon to restore enough to meet those installments, with interest. The fund thus segregated was designated by appropriate title as a special fund, and, at the time of the trial below, was intact and sufficient to meet all installments in default.

By assignments and transfers (questioned in matters of form by defendants, but on examination found by us to be sufficient in form) the Neosho City Water Company transferred its claims and rights under ordinance 232 to the Michigan Pipe Line Company, to which company it seems to have been indebted through

Saleno for material used in constructing the waterworks, and the Michigan Pipe Line Company thereafter transferred its rights under the foregoing transfer and assignment to the plaintiff; and thereupon the plaintiff instituted the suit at bar.

The alternative writ of mandamus in the case at bar narrates certain of the foregoing facts; and the defendant Prettyman made return in which he admitted the narrations of fact in the alternative writ and consented that a peremptory writ go. The other defendants made return in substance and effect denying the validity of the contract evidenced by ordinance No. 232. The theory of this return is that by ordinance 232 a debt of \$46,000 was created against the city, to-wit, \$25,000 in bonds and \$21,000 to be paid off by twenty-four semiannual payments of \$875 each. Defendants allége that this alleged debt of \$46,000 was in excess of the limits imposed by section 12 of article 10 of the Constitution. And they further say that in so far as said ordinance created a debt of \$21,000 to be paid in semiannual installments, the indebtedness is void because at the time or before the time of its creation there was no provision for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and to constitute a sinking fund for the payment of the principal thereof, as demanded by that section of the Constitution.

The averments of the return were sufficient to raise said two defenses, and issue (as said) was joined by a reply. At the trial there was no proof of any provision for a tax levy to meet the interest on the semiannual installments, or to create a sinking fund to pay the principal; and the proof relating to the amount of taxable property in Neosho was such that if we adopt the theory that the semiannual installments provided for by ordinance No. 232, constitute a debt within the purview of the Constitution, then, when added to

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the \$25,000 of bonded indebtedness, the total indebtedness was beyond the constitutional limit of five per centum on the value of taxable property, ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness. The judgment sets forth certain findings of fact, and a peremptory writ of mandamus was ordered to issue in the following terms:

"Now, therefore, we being willing that your duties as such mayor and board of aldermen of said city be fully performed, and that complete justice be done in the premises, it is by the court considered and adjudged that the writ of peremptory mandamus be issued to the said defendants, mayor and board of aldermen of said city, to-wit: J. W. Lamson, mayor, R. L. Wills, Ed Rathell, R. H. Robinson, E. E. Carnes, F. T. Taiclet and J. S. Rowe, composing the board of aldermen of said city, and to each of them, directing that they issue forthwith and cause to be delivered for payment to the said relator, Henry B. Smith, in due and lawful form warrants or orders upon the treasurer of said city, passed and ordered by you in due form on and requiring payment out of, the particular and special waterworks earnings and fund aforesaid in the sum of \$2,625, being the amount of said two semiannual payments for 1903 and first semiannual payment for 1904, and that hereafter you and your successors in office at your first meeting after the 1st days of January and July on the request or demand of the relator or whenever so demanded by him after so becoming due issue and deliver to him a like warrant or order for the sum of \$875 on said fund for the respective semi-annual payments hereafter to become due until the expiration of said contract.

"And that relator have and recover his costs and charges in this behalf expended and have execution therefor."

It will be seen (as said) that the peremptory writ lays no command upon the city authorities to issue warrants for the installments provided for in the years 1901 and 1902; and on this account plaintiff appeals and complains; whereas defendants complain that warrants covering the installments to be turned over in 1903 and subsequent years were ordered to issue; and on this account they appeal.

I. There is a general (but somewhat surface) view to this case; for instance, the finger can be put upon many advantages to the city of Neosho springing from the compromise evidenced by ordinance 232. Thus, it bought peace. Then, subject to a reservation, it acquired the waterworks system and with that the right of way for pipe lines outside the city, the reservoir of the water company and its property right in the Elm Spring,—i. e., the water supply of the town. So, too, it relieved itself from the menace of existing judgments for accrued hydrants rentals and other judgments impending and about to fall upon it. These judgments were a charge upon, and, therefore, a wearing, depleting drainage on its general revenues, sapping its municipal health and hamstringing its municipal vigor. Again, it relieved itself from the payment of \$3,050 per annum for the eleven or twelve years remaining of the Saleno term under ordinance 113. Moreover, the installments provided by ordinance 232 would (presumably) take care of themselves out of a portion of the income arising from the sale of water to private consumers, leaving the city the free use of water for fires and to clean its streets and flush its sewers, for its schools and public offices, baths and drinking fountains, and providing a fairly sure increase in its revenue from the surplus from the sale of water to private consumers, increasing from year to year as the city grew and the plant developed.

There is another phase to a general view; for in-

stance, in so far as the city of Neosho seemingly is made to tightly grasp with one hand (a mailed hand) the benefits of the contract in question and at one and the same time is made to lightly put away from it with the other hand (an inconstant and nerveless hand) the burdens of that contract, it, wittingly or otherwise, is made to play a role not bespeaking judicial sanction, unless that sanction be coerced by the imperious voice of the Constitution itself.

But, if we are to deal comprehensively with the subject, at the very outset it must not be forgotten that those who dealt with Neosho did so with their eyes open to any infirmity in the power of that city to contract. Further, it must be assumed that we may not be controlled in our exposition of the Constitution by the mere advantages to accrue to Neosho, nor by the mere sentimental ethics of the situation. It is enough for us to know that ours is a government by written constitutions and that the Constitution of this State puts an impassable limit upon the power of municipalities to become indebted. That Constitution was framed by plain men. Its language is plain, its purpose is plain; and the duty of this court, as of every court, is not to subject its words to any over-nice or extraordinary gloss, but to hew to the line in its exposition, letting the chips fall where they will—our duty is to make such construction as, in the language of Maxwell (Maxwell, *Interp. Stat.*, 133-4) “shall suppress all evasions for the continuance of the mischief.” “To carry out effectually the object of the statute,” says the author, “it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined. . . . When the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though

they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act, simply because, according to the true construction of the statute, it is the thing thereby prohibited." The reasoning of *State ex rel. Columbia v. Wilder*, 197 Mo. 1, accords with the foregoing.

The Supreme Court of Indiana, in *Voss v. Waterloo Water Co.*, 163 Ind. 1. c. 90, quotes with approval the foregoing, and adds language to be unreservedly commended, viz.: "It is not material whether or not there was any fraud on the part of any one, nor does the necessity for said water and light plant make any difference, if by said arrangement the town became indebted within the meaning of our Constitution. The language of article 13 of the Constitution is plain and simple, and its meaning unmistakable. The incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited, no matter what the necessity, pretext, or circumstances may be, except those provided for in said article, or the form which the indebtedness is made to assume. It binds the courts, curbs the power of the Legislature, the officials, and the people themselves, and was intended to protect the taxpayers by confining the indebtedness of a municipal corporation within a prescribed limit."

In *Browne v. City of Boston*, 179 Mass. 1. c. 324, MORTON, J., said for that court: "The manner in which the indebtedness is sought to be created is immaterial if the result is to subject the city to a present liability direct or indirect which the taxpayers will eventually be called on to meet."

And as pointed out by defendants' learned counsel, the admonition in the words of Justice MILLER in *Litchfield v. Ballou*, 114 U. S. 1. c. 192-3, in commenting upon a provision (similar to ours) in the Constitution of Illinois, should be heeded, viz.: "It [the city] shall not *become indebted*. Shall not incur any pecuniary liabil-

ity. It shall not do this in *any manner*. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose*. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."

The constitutional language under exposition by Justice MILLER in *Litchfield v. Ballou*, is not a whit stronger or plainer than the language of our own Constitution in section 12 of article 10, reading that: "No county, city, town . . . shall be allowed to become indebted *in any manner* or for any *purpose* to . . . an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained," *etc.*

Now, in this case, it must be admitted that the \$25,000 evidenced by bonds were an indebtedness. It matters not to what use the proceeds of those bonds were put. Whether they were used to buy useful property or to pay valid debts, or both (as they were) the bonds themselves constitute an indebtedness of the city of Neosho in the amount of their face. It was shown, *nisi*, that the taxable wealth of the city of Neosho according to the proper assessment would not support more than, say, \$30,000 of constitutional indebtedness. Therefore, unless we are to palter with the situation, it must be held that if the \$21,000 to be turned over in semiannual installments to the water company be also a debt of the city, then, by that holding, such debt was born under the gall and wormwood of a constitutional malediction and is dead in trespass and in sin.

Furthermore, although in oral argument by defendants' learned counsel and in their briefs it was suggested that the city of Neosho does not doubt or attack the validity of the bond issue, yet we are reminded that, as in olden time a new king arose who knew not Joseph, so, in the capricious vicissitudes of municipal politics, a new city administration may arise and govern Neosho that may take and hold a sinister view of the validity of these same bonds. It may be said here and now that the validity of a debt does not depend on the momentary whim (*i. e.*, the mere ambulatory or saltatory views) of the debtor. Looking to the record, it is apparent that both bonds and semi-annual installments are provided by the same contract, the same ordinance—the breath of life is breathed into them by one act. They further but one, and that a common, purpose. The compromise contract cannot be split into parts, some to be taken and others left, inasmuch as the scheme is indivisible and its parts interdependent. This being so, under the doctrine of *Thornburg v. School District*, 175 Mo. 12, courts may not pick and choose between the bonds and the installments, judicial power may not scale the indebtedness down to a constitutional limit, and, hence, the whole body of it would be undermined and liable to be thrown down by a decision establishing the invalidity of a portion of that debt—provided, it is a debt.

II. What is a debt? *BURGESS, J.*, in *Saleno v. City of Neosho*, *supra*, says: "A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed." Sometimes the word "debt" is used with a very wide import. When so used in a general or popular sense it may be said to be that which is due from one person to another,

whether money, goods, or services; that which one person is bound to pay or perform to another. But "debt" within a constitutional purview has no such wide play in meaning. On the contrary, "debt" in the sense the words "indebted" and "indebtedness" are used in the Constitution, must be restricted to mean a promise by the municipality, grounded in a valid consideration, to pay to some person a sum of money now due and payable, or to become due and payable at a future day—an obligation resting on the debtor to pay with a correlative right in the creditor to enforce payment.

In the exposition of the matter in hand (the case calling for it) we may first profitably attend to certain rules for construing contracts. For example: Says Bishop (Bish. Cont. [En. Ed.], sec. 380), "The rule most conspicuous and wide-reaching of all is, that a written contract shall be so interpreted as, if possible, to carry out what the parties meant." Says Lord Coke: "Whenever the words of a deed, or of the parties without a deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." [Co. Litt. 42.] Says Jones (Jones on Const. Cont., sec. 223): "And it is said to be a well-settled rule in the interpretation of contracts, that when a clause is capable of two significations, it should be understood in that sense which will have some operation rather than in that in which it will have none." Sec. 224: "Under the foregoing rule, therefore, a contract which admits of both a legal and an illegal interpretation will be construed in its lawful sense, and the presumption is that the parties act in conformity to law." Says Beach (1 Beach, Cont., sec. 717): "Where a contract is fairly open to two constructions, by one of which it would be lawful and by the other unlawful, the former must be adopted. The presumption is in favor of the legality of contracts. The law does not

assume an intention to violate the law, nor will an agreement be indulged to be illegal where it is capable of a construction which will uphold it and make it valid."

Apropos to the subject are the words of Lord HOBART, Lord Chief Justice of the Court of Common Pleas in 1614. Chancellor Kent speaks of him as "a very great lawyer," and Jenkins as one who has "furnished surprising light to the professors of law." Referring to the need of judicial astuteness in the searching out of the very marrow of a transaction to get at the true intent of parties to a contract, Lord HOBART in *Pits v. James* (Hobart's Reports, l. c. *125a and *125b), says: "And Ecclesiasticus . . . speaks of this elegantly, thus: 'There is a subtilty that is fine, but it is unrighteous, and there is that wresteth the open and manifest law; yet there is also that is wise and judgeth righteously.' " Thereon he comments shrewdly and quaintly, as follows: "So he makes three degrees; some impudent to give false judgment grossly; some others as wicked, yet do it more cunningly under pretense of strains of law. But a man may be as wise and fine to justice as any others to fraud; and so I commend the judge that seems fine and ingenious, so it tend to right and equity; . . . and I condemn them that either out of pleasure to shew a subtle wit, will destroy, or out of incuriousness or negligence will not labor to support, the act of the party by the art or act of the law." And again, in *Clanrickard et ux. v. Sidney* (*Ibid.* *277b), the same great judge says: "And here, first, I do exceedingly commend the judges that are curious and almost subtile, *astuti* (which is the word used in the Proverbs of Solomon in a good sense, when it is to a good end) to invent reasons and means to make acts according to the just intendment of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act."

In light of the foregoing generalizations, we must, in determining whether the semiannual installments aggregating \$21,000 constitute an indebtedness to that amount; look about us a little and interpret the contract by animating its cold words (and sweetening its sour ones) by the purpose to be subserved by the contracting parties, by their intentions, if they can be got at, and by the whole environment. In the exposition of this matter we may assume that both parties to this compromise were of one mind in honesty of purpose, that neither the one nor the other intended to violate the Constitution, and that neither party was *inops concilii*. To the contrary, both parties had the advantage of acting under the advice and supervision of counsel armed with militant dispositions and legal learning ample to keep their clients in the main-traveled road of constitutional law. Indeed, if every man is presumed to know the law, and if that formula is ever to be applied, then, *a fortiori*, may it be rigorously applied to the parties in this case. And this is so because the persistent and multiform litigation forerunning the compromise must be allowed value as an educational factor; since thereby both litigants and counsel were made alive to the delicacy of the situation and to the constitutional limitations upon the contractual power of cities of the fourth class.

It may be said, then, that all parties approached the compromise forewarned of those constitutional limitations and awake to the lurking dangers besetting the subject-matter. In this view of the case it is incomprehensible that either the city of Neosho or its counsel, or the Neosho City Water Company, or its counsel, could have had any intention to make the \$21,000 (represented by installments) a subsisting indebtedness of the city; for if we adopt that notion it would be the same as to say that either a wilful violation of the Constitution was intended, or that one party or the other was

dealing with Punic faith in the compromise—*i. e.*, while ostensibly burying the hatchet, it was buried *with the handle up for future war*.

In the light of the foregoing, the question in hand may be put in a different form—thus: Did the parties to this compromise, in spite of themselves, so frame their contract that, in seeking to avoid the pitfall they knew existed, they fell into it? Let us see about that.

III. Ordinance 232 refers to the deed in evidence, to the former ordinance 113, to past litigation and existing judgments, as well as to a present liability for hydrant rentals, and finally refers to itself “as a final compromise contract.” We are invited then, by the ordinance, to read the deed, the two ordinances, the judgments and the story of the litigation and the scope and intendment of the compromise into the contract evidenced by ordinance 232; and we are invited by the law to approach the exposition of that contract in the light of the assumptions that the parties knew the law, intended no evasion of the law and were dealing honorably with each other for the purposes set forth in the contract, to-wit, not only of a compromise, but “for the securing of a better fire protection and water service for the said city of Neosho.”

It must be admitted that Ordinance 232 is unhappily worded; and that if we alone consider the deed of conveyance and certain detached phraseology in the ordinance and spell out the contract by a close construction of that deed and that phraseology, it would appear that the Neosho City Water Company, for the sum of \$46,000, \$25,000 paid in hand and the balance to be paid as a debt in equal semiannual installments covering twelve years, sold its properties to the city of Neosho, released all its prior indebtedness against the same, and stepped down and out—that city thereby becoming not only the absolute owner of its waterworks, its rights of way, its franchises, its source of water supply, but be-

coming the owner of the absolute title to the revenues and income therefrom as well.

But ordinance 232 may (and to my mind should) be approached from another standpoint. There is language in that ordinance showing the foregoing view not to be within the intendment of the contracting parties. To my mind that intendment (and therefore the contract itself) as gathered from its four corners and in the light of all the circumstances of the case, must be held to be the same as if the ordinance had said, in substance: "Whereas, the city of Neosho and the water company estimate the properties and assets of said company (consisting of real property, franchises and easements, as well as of judgments and accrued installments of hydrant rental due from the city) as worth \$46,000; and, whereas, the city and said company have been for seven years in continuous litigation and disagreement and the city is willing to buy said works and pay said judgments, and the company is willing to sell; and, whereas, the city of Neosho is willing to issue \$25,000 in bonds and pay that sum out of the proceeds on said judgments and on said property; and, whereas, the said city under the Constitution cannot become indebted, beyond the amount of the bonds provided for herein; and, whereas, the water company recognizes the inability of the city to become indebted, either by express or implied agreement, and is willing by way of accord and compromise to satisfy the said debts and sell its said properties to the city on that theory, reserving to itself no lien or incumbrance on the works proper, or any fixtures thereto appertaining but reserving to itself only so much of the usufruct of said waterworks for twelve years as will equal the sum of \$21,000 (no reservation for any period of six months to exceed \$875); and, whereas, the city is willing to buy on those terms and thereafter keep said works in good condition, provided it does not become indebted to the

water company for any portion of said \$21,000 so reserved, and provided it is put in immediate possession of the plant, with power to control and develop the same and with the power and duty of maintaining the water charges now existing and acting in the capacity of a collector for the water company and as custodian of so much of the charges paid by the consumers as will amount to the aforesaid installments so as aforesaid reserved—the same to be turned over to the water company semiannually, therefore, this compromise is made on the foregoing basis—the city to own the rest and residue of the income of the works from paid water service, and the water company to at once make a deed of conveyance with full assurances of title and at once satisfy all its judgments against the city and give an acquittance for all liability for hydrant rentals under ordinance 113. It is hereby expressly agreed that the city is not bound, directly or indirectly, for the payment of said \$21,000—that is, the said installments shall not become a charge upon the general revenues of the city, but the water company must look alone to the revenue from paid water service for said installments; and the city accepts the foregoing reservation of portions of the income from paid water service, assumes the duty of collecting, conserving and turning over said reserved part of the income, provided, further, that if the city default as trustee for the water company in the maintenance, collection, conservation and turning over of said semiannual installments, the water company, for the purpose of gathering said installments, may temporarily, from time to time, retake possession of the works and collect enough of the earnings to satisfy defaulted installments. But if it retake possession of the works at any time for such purpose it shall keep the same in good condition and (barring the retention of any installment in default)

shall operate the same during such time or times for the benefit of the works and city under the terms of ordinance 232."

The underlying purpose of the constitutional prohibition of an indebtedness beyond five per centum of the taxable wealth of a city was to serve as a limit to taxation—as a protection to tax payers. If, therefore, there was no debt contracted for the \$21,000, then the citizens of Neosho are accorded the full protection of the Constitution, and the interdiction of section 12 of article 10, *supra*, does not apply. The contract in question provides for the creation of a special and particular fund without resorting to the power of public taxation; and the waterworks company and Smith, its assignee, may look alone to that fund in the first instance—what might happen if the city tortiously misappropriated and dissipated that fund, we need not inquire. Such acts might (or might not) render the city liable as for a tort; and the liability for torts is not one within the constitutional provision under consideration. [Conner v. City of Nevada, 188 Mo. 148.] But that question is not here, and, therefore, is not decided.

Some of the words of the ordinance create an ambiguity and resolving all doubts in favor of the validity of the contract, as we are bound to do, we hold that the \$21,000 to be turned over semiannually do not constitute a debt within the purview of the State Constitution. We think a generous and fair interpretation of the contract leads to that conclusion; and we are encouraged in that view by the omission from the ordinance of any provision for a tax to pay the interest on said installments and the omission of any provision for levying a tax to create a sinking fund to discharge the principal. Defendants' learned counsel argue that the omission of such provisions renders the indebtedness void, but to our minds such omission tends to show the existence of no debt whatever; and when we consider

that the contracting parties were dealing with each other with full and present knowledge of the constitutional prohibition against such indebtedness, the conclusion must be that they did not intend an indebtedness, and it would be doing violence to the intendment of the parties to make an indebtedness out of it.

The law may be said to be a body of rules primarily intended to prevent litigation; but, if litigation ensues, then these same rules are lamps to guide judicial feet to the goal of justice and to get at the very right of the thing in dispute. Hence it is that the law looks with concern on the beginning of litigation and grants its benediction on its close. A compromise, therefore, is much favored in the law as in the nature of a treaty of peace; and a court will never disturb an amicable settlement if it can be sustained without overturning settled rules of law. In this case we are driven to no such hard necessity; for in view of what has been said the contract is valid and (as interpreted) does not create an indebtedness within the reasoning of many cases expounding constitutional provisions somewhat similar to our own. [Winston v. Spokane, 12 Wash. 524; Donahue v. Morgan, 24 Colo. 1. c. 398, *et seq*; Faulkner v. Seattle, 19 Wash. 320; Ft. Dodge Electric Light & Power Co. v. Ft. Dodge, 115 Iowa 568; Swanson v. Ottumwa, 118 Iowa 161; City of Laporte v. Gamewell Fire Alarm Telegraph Co., 146 Ind. 466; Brockenbrough v. Board of Water Commissioners of Charlotte, 134 N. C. 1; Adams v. City of Ashland, 80 S. W. 1105; Stone v. Chicago, 207 Ill. 492; Gedge v. Covington, 80 S. W. 1160.] The principle decided in the foregoing cases may be said to rest somewhat on the same reasoning employed by this court in sustaining levee bonds to be paid out of benefits accrued. [Morrison v. Morey, 146 Mo. 543; see, also, Kansas City v. Bacon, 147 Mo. 259.]

IV. There are business and proprietary powers

inherent in a city of the fourth class to be exercised through its board of aldermen as distinguished from legislative and governmental powers to be similarly exercised. In so far as such city is exercising ministerial and business functions and dealing with property rights, it is as much within the control of courts as private individuals are, and may be compelled to act or desist from action as the courts direct. When a city is exercising purely governmental or legislative powers, it is not so clear that it may be compelled to do and perform, or prohibited from doing and performing. [State *ex rel.* v. Gates, 190 Mo. l. c. 558, *et seq.*, and cases cited.]

Plaintiff's counsel, in a supplemental brief, filed January 22, 1907, cite us to many cases illustrating under what circumstances a municipality may take and hold private property and execute imposed trusts, and become responsible precisely as a private individual under similar circumstances, but this phase of the case need not be further developed.

Here a fund has been accumulated from paid water-service, that does not belong to the city, though in its chest. In part it was segregated and accumulated by force of a judgment in the Matters' mandamus suit. In part it was accumulated by the voluntary act of the city in undoing the wrong it had done—by the dissipation of that fund for 1901 and 1902, in that, when its duty to preserve the fund was pointed out by the judgment of the court in the Matters' case, it voluntarily (and honorably) restored the integrity of the fund for those years. This case is submitted to us on a record showing the fund intact in the city treasury; and, as it belongs to the plaintiff, and as the city holds it as trustee for plaintiff, it ought to turn it over to its owner; and a convenient and practical way to compel the performance of its duty in that behalf is by a peremp-

tory writ of mandamus requiring warrants to be issued in due form against the fund.

There are other questions discussed by counsel which we deem not vital to a just disposition of the case, and, therefore, they are put to one side.

There was error, *nisi*, in not granting plaintiff the full relief prayed. The alternative writ of mandamus required defendants to show cause why relief should not be granted by issuing warrants for the installments of January 1, 1901, and every six months thereafter. Defendants failed to show good cause, and, therefore, this cause is reversed and remanded with directions to the lower court to enter judgment in favor of plaintiff, making the alternative writ peremptory and final—defendants to pay all costs, including costs of this appeal.

Gantt, C. J., Burgess, J., and Graves, J., concur; Valliant, J., concurs in the result; Woodson, J., dissents, and expresses his views in a separate opinion in which Fox, J., concurs.

DISSENTING OPINION.

WOODSON J.—This is a mandamus proceeding instituted in the circuit court of Newton county to compel the mayor and board of aldermen of the city of Neosho to pay over to the relator certain funds in the treasury of the city collected as water rentals under and by virtue of City Ordinances Nos. 113 and 232 of the said city of Neosho.

There is but little controversy as to the facts, and they are substantially as follows:

Neosho is a city of the fourth class, and said city by said ordinance No. 113 granted a franchise to one S. V. Saleno to construct and operate a system of waterworks in said city, and contracted for water to be furnished to the city and its inhabitants, and agreed to

pay an annual water rental of two thousand dollars for the first fifty hydrants erected by Saleno, and for all in excess of that number an additional rental of thirty dollars each, all of which in this case amounted to \$3,050 a year, and to be paid in semiannual installments of \$1,525 each on the first days of January and July of each year for a period of twenty years, and fixed a schedule of prices to be charged the inhabitants of the city for the water used by them. This ordinance has been before this court upon two former occasions; on each it was held valid and binding on the city.

After many years of litigation the water rentals, interest and costs amounted to an indebtedness aggregating \$25,000 or \$26,000, with no money in the treasury of the city to pay it. In order to meet that condition of affairs, the city of Neosho, on February 14, 1899, duly enacted by its mayor and board of aldermen Ordinance No. 232, which is as follows:

“ORDINANCE No. 232.

“An ordinance to provide for the compromise of all matters of difference between the city of Neosho and the Neosho City Water Company arising out of the contract ordinance of the 22nd day of September, 1890, numbered 113; and for the city of Neosho purchasing, taking over and operating the waterworks constructed under said ordinance; and for the satisfaction of the judgments and hydrant rental claims against the said city of Neosho in favor of said Neosho City Water Company; and for the securing a better fire protection and water service for the said city of Neosho and selling water to its inhabitants; and for the issue of twenty-five thousand dollars of interest-bearing ten—twenty (years) city bonds, and the levy of a tax for a sinking fund to pay the same and for securing to the said Neosho City Water Company semiannual installment payments, for twelve years, of eight hundred

and seventy-five dollars each, for use of waterworks as a compromise measure; and for the repeal of said ordinance No. 113 so far as inconsistent with this ordinance.

"Be it ordained by the board of aldermen of the city of Neosho as follows:

"Section 1. That, with the assent of the voters of said city, by a two-thirds affirmative majority vote, at the time hereinafter provided, the following contract is hereby authorized to be made, and the same may be accordingly certified by the mayor and clerk and authenticated by the seal of the city of Neosho, Missouri, as a final compromise contract with the Neosho City Water Company, as assignee of S. V. Saleno, viz: This contract is made in full compromise and settlement of all and every judgment, claim and demand against said city under ordinance No. 113, and it is agreed as follows:

"The Neosho City Water Company, as assignee of said S. V. Saleno, agrees to transfer, by proper legal conveyance, the title, possession and use of the entire system of waterworks, land, water springs, pipe lines, pipes, right of way, easements, franchises, hydrant, and all other property thereto belonging or used in operating the same, free and clear of any charge or incumbrance, to the city of Neosho with the right to the city to operate and control the same, collect all rent or toll for supplying water to all persons whatsoever, and have and use, subject to the reservation hereinafter mentioned, all the proceeds and hydrant rental of said plant for a period of twelve years from January 1, 1899, *and release the city from all hydrant rental and liability relating to the same under the provisions of said ordinance No. 113, except as herein expressly provided*, and in consideration thereof the city agrees to pay for the use, control and possession of said works the sum of \$875 every six months, on or before the first

day of July and first day of January of each year for a period of twelve years, from January 1, 1899; and in consideration of said payments and the payment of twenty-five thousand dollars for judgments and in full settlement of all claims and differences existing between said parties as in this ordinance provided, it is agreed and contracted that the city shall own said works absolutely, and it is further agreed that the Neosho City Water Company, as the legal assignee of said S. V. Saleno, shall on the day the twenty-five thousand dollars is paid to said company as herein provided, make out, execute and deliver a deed and conveyance in due and legal form, assigning, setting over and conveying to said city the entire plant and waterworks system, including land, water springs, right of way, pipe lines, pipes, hydrant, easements, franchises, and all other property of every kind belonging thereto, or used in connection therewith, both real and personal, with all the office books for the use in continuing the service of water to private persons, free of all liens, charges and incumbrances, and will give a perfect title to the same to the city of Neosho.

“On the payment of the said sum of twenty-five thousand dollars by said city to said Neosho Water Company, all judgments and other indebtedness, *except as herein provided*, in favor of said Water Company and against said city shall be deemed fully paid and discharged, and said Water Company shall cause to be entered on the proper court records formal satisfaction of each and every such judgment, and all suits of whatever nature now pending between said parties shall be dismissed, each party paying its own costs.

“Section 2. It is provided, however, that there shall be reserved to the said company for additional security for the payment of said sum of eight hundred and seventy-five dollars semiannually the following

rights, viz: *All earnings, proceeds and revenues arising from water service to private consumers for each and every successive period of six months during the continuance of the contract hereby authorized, to-wit, twelve years, shall not be used for any other purpose than to pay the semiannual installment of eight hundred and seventy-five dollars for such term for the use of the waterworks as herein provided until said payment is made (aggregating \$21,000); it being understood that all the rest, residue and remainder of the said earnings and proceeds, after satisfaction of said semiannual installment shall be free for any legitimate use by said city; and it is further provided that if the said city fail to make payment for any six months term as agreed herein for thirty days after the same is due, the said Water Company may take possession of the said works and operate the same and collect earnings from private consumers until all the unpaid installments be satisfied out of the same; and it is further provided and agreed that the city shall keep the said works in good condition and continue to serve its inhabitants and collect therefor substantially the same rates for water service as heretofore collected by the company for like services, until all of said indebtedness is paid."*

Section 3 of said ordinance provides for the issue and sale of twenty-five thousand dollars in bonds and the payment of that amount to the Neosho Water Company "in payment of all present indebtedness and part payment of the purchase price of said waterworks system."

Section 4 of said ordinance provides for the levy and collection of an annual tax to constitute a sinking fund to pay the twenty-five thousand dollars in bonds.

Sections 5, 6, and 7 of said ordinance provide for its submission to the voters of the city for ratification.

Which ordinance was duly accepted by the Water Company.

This ordinance was not ratified by a two-thirds vote of the qualified voters of the city; at least the record is silent as to whether an election was held for such purpose, or what its result was.

No provision was made by the city at the time of or before the enactment of said ordinance for the levy and collection of an annual tax to pay the interest and to constitute a sinking fund to pay the principal of the twenty-one thousand dollars payable in semiannual installments, in twenty years; although such a provision was made for the payment of the bonds, but in lieu of the constitutional provision for a sinking fund the parties substituted a mortgage or pledge upon the receipts of the water system.

The city sold the bonds provided for under said ordinance, paid over to the Neosho City Water Company the proceeds (twenty-five thousand dollars), and said Water Company executed and delivered to the city a warranty deed, dated April 24, 1899, conveying to the city by the covenants of grant, bargain and sell its entire water system, lands, pipe lines, hydrants, etc., free and clear of any and all encumbrances. The Water Company's judgments against the city were paid and satisfaction entered, pending suits were dismissed and costs paid, etc. The city took title and possession of said waterworks under said conveyance and has maintained and operated the same ever since. The city paid three semiannual payments of \$875 each, the two for 1899 and first one for 1890 (due July 1) and then defaulted.

In 1903 W. T. Matters and other citizens and taxpayers of the city brought a mandamus proceeding in the name of the State at the relation of a taxpayer, requiring the mayor and board of aldermen to segregate, set apart and reserve the water rentals for each six

months in a sum equal to \$875, to be applied in the payment of the Water Company's interest in said rentals as reserved by the contract and Ordinance No. 232. Some of the city's officers returned that they stood ready to so apply the water rentals, and others denied the validity of the contract on various grounds, among others, that the contract was in violation of section 12 of article 10 of the Constitution.

The case was tried and the evidence tending to show the assessed valuation for the year 1899, and prior years, was introduced in evidence, as well as the ordinance and other testimony; and the court, after hearing the evidence, rendered judgment for the plaintiff, directed the issue of a peremptory writ of mandamus requiring the city authorities to set apart from the water rentals the sum of \$875 on the first days of January and July of each year for the payment to the Water Company of its rental under the terms of said contract, and requiring the city not to use the water rentals until such sums were paid. This judgment remains in full force and effect.

And the evidence tended to show the Water Company in the meantime assigned its rights to the Michigan Pipe Line Company, and that company assigned its rights to the relator, Henry B. Smith. In the meantime the city authorities restored to the fund arising from water rentals a sufficient sum to pay off and discharge the rentals due the Water Company, and has ever since set apart sufficient of the water rentals for that purpose in obedience to the peremptory writ of mandamus so issued by the circuit court, and there was in the treasury at the time, set apart under this judgment and order of the circuit court, sufficient funds to pay off and discharge all the water rentals due this relator.

Respondents introduced evidence tending to show the assessed valuation of the year 1899 and prior there- to was not introduced in evidence in the case of Matters

et al. against the city in the mandamus proceedings; that the relator was not the assignee of the Michigan Pipe Line Company; that the expenses paid by the city for the repairs and operation of the waterworks were more than the total income derived therefrom; that the money set aside as water rentals was, in fact, taken from the general revenue of the city; and that the assessed valuation of the city was \$603,860, as shown by the last previous assessment prior to the date of Ordinance No. 232.

The court, after hearing the testimony, rendered judgment for plaintiffs, directing a peremptory writ of mandamus to be issued, requiring the city to pay over to the relator all hydrant rental which was collected after the institution of the first mandamus proceedings and requiring future rentals to be segregated and paid over to relator.

Both the relator and respondents objected to the findings and judgment of the court, and in due time they filed their motions for a new trial and in arrest, which were by the court overruled, and they have duly prosecuted their joint appeal to this court.

I. The position of the relator is that Ordinance No. 232 is an amendatory ordinance to No. 113 and that the former repeals the latter in so far only as they are inconsistent with each other; that the deed executed by the Water Company to the city of Neosho must be read in connection with the contract and ordinance upon which the same is based, and that when so read the contract and ordinance create a reservation in favor of the Water Company for the portion of the water rentals received from water consumers as was set apart and segregated by the city in pursuance of the mandamus proceedings instituted by W. T. Matters; that the rentals, \$875, every six months reserved by the Water Company under the compromise contract and ordinance are not a debt within the meaning of the Consti-

tution, and, therefore not in violation of section 12 of article 10 thereof; that the compromise contract has been adjudged valid by the circuit court of Barton county in the mandamus cause above mentioned.

Relator also contends that should the court conclude that said contract required the city to pay the Water Company the semiannual installments out of the general revenue and that such contract constitutes a debt within the meaning of the Constitution, then that part of the contract in relation to paying out of the water rentals is binding, and the other clauses may be rejected, as the means of payment provided for by the two clauses are independent of each other.

The contention of the respondents is that the contract upon which relator's claim is based is void as being in violation of section 12 of article 10 of the Constitution, because creating a debt in excess of five per cent of the assessed valuation of the city property as shown by the assessment next before the last previous assessment thereof; that the ordinance in question created an indebtedness to the amount of \$46,000, while the assessed valuation of the city was only \$603,860, so that the debt exceeded by \$15,807 the five per cent limitation provided for by the Constitution. And also void because no provision was made for the levy and collection of an annual tax sufficient to pay the interest as it fell due and to constitute a sinking fund for the payment of the principal.

The statement of the facts and the position of the parties have been taken largely from the well and carefully prepared briefs of the able counsel in this cause. But in the view we have taken of the case it will not be necessary to pass upon all the questions presented by them.

At the threshold of this case, the question presented for our consideration is the character of the obligation of the city of Neosho to the Water Company re-

garding the \$46,000 mentioned in Ordinance No. 232. That \$46,000 was the purchase price promised by the city to the Water Company for the water system. The city paid \$25,000 of that sum in bonds, issued for that purpose, and agreed to pay the balance in installments of \$875 each, semiannually, on the first days of January and July, for the period of twelve years, which amounts to \$21,000; and it was further agreed that, as additional security for the payment of said sums of \$875 semiannually, the city should take possession of the waterworks and collect the water rentals from the water consumers, and pay that sum to the Water Company every six months, as above stated.

Now, the question arises, are those debts within the meaning of the Constitution?

In so far as the \$25,000 represented by the bonds are concerned, there is no controversy, as the city concedes their validity, but contends that the \$25,000 added to the \$21,000 makes a total of \$46,000, which is in excess of five per cent of the assessed valuation of the city, which was \$603,860, and for that reason the ordinance and contract regarding the \$21,000 are in violation of section 12, article 10, of the Constitution, which is as follows:

“No county, city, town, township, school district or other political corporation or subdivision of the State, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment for State and

county purposes, previous to the incurring of such indebtedness."

It will be seen that the section just quoted says no city shall *become* indebted. The indebtedness there mentioned refers to new debts or obligations created or contracted for by the city and does not refer to prior valid debts and obligations of the city, except, however, they must be considered and included in the estimation whenever any new or additional indebtedness is proposed to be saddled upon the city. The object of the Constitution is to prevent the city from going into debt beyond a certain amount and not to extinguish its valid obligations. That being true, it becomes necessary to determine to which of the above classes of indebtedness the \$21,000 belongs, to the new or the old.

It must be borne in mind that at the time of the enactment of Ordinance No. 232 this court had, in two cases, held that Ordinance No. 113 and the contract of S. V. Saleno with the city were valid and binding upon the city. [Saleno v. City of Neosho, 127 Mo. 627; Neosho City Water Company v. City of Neosho, 136 Mo. 498.]

Said ordinance No. 113 provided that the City of Neosho shall pay Saleno or his assigns \$1,525 semianually, on the first days of January and July, for twenty years as hydrant rent. The sum total of that item for twenty years is \$61,000, which the city was bound to pay according to the terms of that ordinance, conditioned upon Saleno furnishing the water called for thereby.

At the end of the litigation above mentioned, as near as we can ascertain, seven years of the twenty had expired, and at the time when the city purchased the waterworks there was then due the water company for hydrant rentals, interest and costs about \$25,000. This sum, at that time, under the terms of Ordinance No. 113 and the decisions before mentioned, had ripened in-

to an absolute and unconditional debt of the city. This twenty-five thousand dollars was paid out of the proceeds of the sale of the bonds provided for in Ordinance No. 232, and the balance thereof, \$21,000, was still a conditional liability due the water company, of course, and unpaid on the day the waterworks were transferred to the city. Said \$21,000 *was a part* of a larger sum, namely \$61,000, the city was conditionally bound to pay Saleno or his assign by said ordinance No. 113, upon *condition* that he furnished the water for the whole twenty years; and by Ordinance No. 232 the city renewed its obligations for that sum to the Water Company upon the terms and conditions therein stated. By this arrangement the city contracted no new debt or obligation, but simply made new arrangements to pay an old debt or a then existing valid obligation, and at the same time canceled \$15,000 of its obligation created by Ordinance No. 113 which is shown by deducting the \$46,000 from the \$61,000. Not only that, the city also became the owner of the waterworks, subject to the payment of the semiannual rental installments of \$875, which it had the right to acquire under Ordinance No. 113.

It is shown conclusively from the foregoing statement of facts that the city made no contract whereby it promised to pay the Water Company any sum of money whatever which it did not previously owe to it.

We know of no law prohibiting the city from making new contracts in renewal of prior valid obligations.

Section 11 of article 10 of the Constitution, and statutes enacted in pursuance thereof, came before the Supreme Court of the United States upon the following state of facts: A county in this State by its county court subscribed for stock in a railway company and issued bonds of the county and sold them for the purpose of procuring the money with which to pay for the stock. Under the law as it existed at the time the

bonds were issued the county court had power to levy sufficient taxes to pay the bonds and coupons as they matured, but in 1875 the present Constitution was adopted which limited the power of the county court to levy a tax in excess of one-half of one per cent on the taxable property of the county for all purposes and under that limitation the court was unable to levy sufficient taxes to pay the running expenses of the county and take up the bonds and coupons as they matured. The holders brought suit on the bonds and recovered judgment against the county for the amount of the bonds and coupons, which the county refused to pay because it had no funds on hand for that purpose. The judgment creditor then brought mandamus proceeding against the county court, asking for an order directing said court to make a special assessment, under the old law, which was in force when the bonds were issued, for the payment of the judgment. The Supreme Court in passing upon that case held that the judgment in favor of the bondholder and the bonds and coupons in legal contemplation were but the continuation of the debt incurred by subscribing for the stock of the railway company, and that all the law and machinery thereof which were in force at the time the subscription was made were still in force and would remain so until the judgment was fully paid and satisfied, and that all laws of the State which were passed since the bonds in question were issued purporting to take away from the county court the power to levy taxes necessary to meet the payments were invalid and of no force or effect. [Ralls County Court v. United States, 105 U. S. 733; Scotland County Court v. Hill, 140 U. S. 41.]

While section 11 is a limitation on the taxing power of the city, and section 12 a limitation upon the contracting power, yet the same principle is involved in

each; that is, neither was intended to affect present existing indebtedness regardless of the various forms it might pass through. It might be evidenced by a subscription of stock, an issue of bonds, a contract by way of judgment, or a contract by ordinance. It is the identity of the debt that is looked at and not the evidence of its existence. In this case the original obligation of the city of Neosho to Saleno for the hydrant rent by agreement of the parties and by operation of Ordinance No. 232 was expressly *reserved* and kept alive and carried forward into the compromise contract, and is the same identical obligation that is now involved in this litigation, most of which has ripened into an actual instead of a conditional indebtedness by reason of the fact that the water has been furnished according to the terms of the ordinances and the contract of compromise.

Neither the city of Neosho by ordinance nor the State by an act of the Legislature had any more power to relieve the city of that obligation without the consent of the Water Company than the Legislature had to relieve the county of its obligation to pay the bonds in the case before mentioned, notwithstanding the fact that the debt or obligation may have exceeded the constitutional limit at the time the city purchased the waterworks.

That excess, if it existed, was caused by the wrongful act of the city by not paying the installments of rents as they fell due. This court has twice held that the obligations of the city created by Ordinance No. 113 were valid and binding on the city, notwithstanding section 12 of article 10 of the Constitution. According to those decisions this excess was valid and binding upon the city under the old Ordinance No. 113, then by parity of reasoning the same identical excess which was *expressly* reserved to the Water Company by the contract of sale to the city must also be held to be valid and binding under the new ordinance No. 232.

II. Respondent contends that mandamus will not lie in this case, because relator's claim has not been reduced to judgment.

We do not concur in that contention. The rights of Saleno and the Water Company and those of the city were fully determined and adjudicated in the case of Saleno v. City of Neosho, 127 Mo. 627, and Neosho City Water Company v. City of Neosho, 136 Mo. 498.

All questions as to the validity of the rentals mentioned in Ordinance No. 113 and which are expressly reserved in Ordinance No. 232 cannot be again litigated in this case. [Harshman v. Knox County, 122 U. S. 318; Ralls County Court v. United States, 105 U. S. 734.]

And the judgments are binding upon the parties thereto and their privies, whether in contract, estate, blood or in law, which includes the relator in this case. [Litchfield v. Goodnow, 123 U. S. 551.]

There are many other questions discussed in the briefs of the learned counsel on both sides of this case, but we deem it wholly unnecessary to pass upon them, as the questions herein passed upon fully dispose of the case.

The judgment of the circuit court in favor of both the relator and respondents is reversed and remanded with directions to that court to enter judgment for relator in conformity to the views herein expressed.

Fox, J., concurs.

JOSEPH W. HEADY et al., Appellants, v. ZUNO
CROUSE et al.

In Banc, March 30, 1907.

1. **REAL ESTATE: Sale of Minor's Interests: Jurisdiction.** A will devised land to a wife and the heirs of her body. A statute then in force authorized the circuit court to order a sale of a minor's real estate for investment in stocks and other real estate when it should appear to the court "after full examination upon the oath of disinterested and credible witnesses" to be for the benefit of the minor so to do, upon the petition of the infant's guardian and curator setting forth the facts deemed sufficient to render the sale desirable and necessary. The husband and wife as plaintiffs asked for a sale of the land of their six children, five of whom were minors, and the reinvestment of the proceeds in other land, the husband being appointed commissioner by the decree to make the sale. It does not appear from the decree that any necessity for the sale was suggested, nor any apprehension of imminent destruction of title or property, or that it was necessary for the support or maintenance of the minors, but the decree rests solely on the foundation that it would conduce to the interest of the minors to sell the land and reinvest the proceeds in other lands. *Held*, that the court had no jurisdiction, under the statute, to order the sale.
2. ———: ———: **General Equity Jurisdiction.** Nor did the circuit court by virtue of its general equity jurisdiction have authority to decree a sale of the minors' land for the mere purpose of reinvesting the proceeds. The jurisdiction of a court of equity to decree the sale of a minor's real estate must be built on something more substantial than a hope that a sale and reinvestment may result in financial advantage to the minor.
3. ———: ———: ———: **Statute.** Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and every thing whatsoever with the minor's estate, simply because he is a minor. The act to be valid must be based on some equitable principle. If the jurisdiction to sell the lands of infants for the mere purpose of investing in other property ever existed in chancery, there is no necessity for its exercise in Missouri, because for more than forty years power to do that is given by statute, under safeguards in the statute prescribed, and is now vested in the probate court.

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4. ———: To Jane and Heirs of Her Body: Child's Death Leaving Children. Where by will land was devised to Jane and the heirs of her body, and children were born to Jane, and afterwards the land was sold in pursuance to a decree of court brought by Jane and her husband against the children, and afterwards the children died before Jane, leaving children of their own born after the decree, the decree and the sale of the land thereunder did not affect the title of the grandchildren. Jane's children, who died before she did were not her heirs; until her death their interests were contingent, and as they died first no title ever vested in them. The interests that would have gone to her children had they survived Jane, at her death became vested in the descendants of such deceased children, and hence the sale did not affect those descendants.
5. ———: ———: Ratification. Where the decree of the court made without jurisdiction created a lien on the land of the commissioner (their father) in favor of the minors whose real estate he was authorized to sell, to secure them in the purchase money, and he in after years divided all the land owned by him among them, giving them deeds of gift therefor, the acceptance of those deeds by the children will not be held to be a ratification of the sale of their lands, there being nothing in the deeds to indicate that they were given to compensate them for their interest in the lands sold by him.

Appeal from Lincoln Circuit Court.—*Hon. H. W. Johnson*, Judge.

REVERSED AND REMANDED.

Norton, Avery & Young and *Frank W. Howell* for appellants.

(1) The estate conveyed by the will was a life estate to the wife, with a contingent remainder to the heirs of her body. *Godman v. Simmons*, 113 Mo. 122; *Emerson v. Hughes*, 110 Mo. 627. (2) The heirs of the body of a tenant for life are not ascertainable until the death of the life tenant. R. S. 1899, sec. 4594; *Emerson v. Hughes*, 110 Mo. 627. (3) While a contingent remainder is not a vested interest, yet it is such an interest under our statute as can be alienated. *Reinders v. Koppleman*, 68 Mo. 432; *Lackland v. Nevins*, 3 Mo. App. 535. But if those, while the life tenant is living,

who are the apparent heirs of the body alienate their interests and die before the termination of the life estate, the grantees will take nothing. *Godman v. Simmons*, 113 Mo. 132. (4) The circuit court of Lincoln county had no jurisdiction or authority, shown under the evidence, to make the decree in 1871, introduced in evidence, and therefore the deed of Joseph M. Heady, as special commissioner, to Rasbach, trustee for the "Eleven," made in 1878, conveyed no title, was void, being made under a void decree, and could be attacked collaterally. *Losey v. Stanley*, 147 N. Y. 567; *Taylor v. Phillips*, 2 Ves. 23; *Calvert v. Godfrey*, 6 Beav. 97; *Jackson v. Talbot*, 21 Chan. 786; *Baker v. Lorillard*, 4 N. Y. 257; *Williams v. Berry*, 49 U. S. 556; *Voules v. Buckman*, 6 Dana (Ky.) 466; *Faukner v. Davis*, 18 Gratt. (Va.) 651; *Messner v. Giddings*, 65 Tex. 301; *Walker v. Snysor*, 80 Ky. 620; *Dodge v. Stevens*, 105 N. Y. 585; *Barton*, Ch. Pr. sec. 170; *Bispham*, Eq., sec. 549; *Pomeroy*, Eq. Jur., sec. 1309; *Tyler on Infancy*, 296; 3 *Wait's Act. and Def.*, 555; *Kearney v. Vaughn*, 50 Mo. 284; *Stevens v. De la Vaulx*, 166 Mo. 20. (5) Under the decisions of our own court, as none of the Heady children could, by any act of theirs, have conveyed their interests in the land so that it would have bound the heirs of the body of Mrs. Heady, which were ascertainable at the time of her death, were it to develop that the apparent heirs conveying were not really heirs of the body of Mrs. Heady, as was the case with Mary B. and Laura M., they dying before their mother, the life tenant, then certainly it cannot be contended that any court, by its decree, could convey a greater interest than the parties to the suit had, and that this decree would not bind the children of Mary B. and Laura M., who were the bodily heirs of Mrs. Heady at the time of her death. *Emerson v. Hughes*, *supra*; *Godman v. Simmons*, *supra*.

James A. Seddon and McPheeters & Harris for respondents.

The decree may be and is supported under the original jurisdiction of the circuit court of Lincoln county as a court of chancery. Under this jurisdiction, independent of any statute, that court certainly had jurisdiction of the general subject-matter of infants' estates—indeed, infants are the special wards of chancery, and peculiarly under their protection, and no part of the jurisdiction of such courts is more important or beneficial. It is generally thought that this jurisdiction belonged to and was exercised by the English Court of Chancery from its first establishment, and that it was originally assumed by the chancellor as representing the sovereign in his capacity as *parens patriae*. In other words, the court of chancery, in the exercise of this jurisdiction, acted under a delegated authority from the sovereign, who, as *parens patriae*, had jurisdiction over the persons and estates of infants in very contemplation of their legal incapacity to act for themselves. *Eyree v. Countess of Shaftsbury*, 2 P. Wms. 118; *Wellsley v. Duke of Beaufort*, 2 Russ. 20; *Wellsley v. Wellsley*, 2 Bligh N. S. 124; *De Manneville v. De Manneville*, 10 Ves. 63; *Ex parte Phillips*, 19 Id. 118; 3 Bla. Com. 427; *Story Eqr. Jur.*, secs. 1328, 1333; *Witter v. Witter*, 3 P. Wms. 101; *Pierson v. Shore*, 1 Atk. 480; *Ashburton v. Ashburton*, 6 Vesey 6; *Inwood v. Twyne*, Amb. Rep. 419. The reasons which lead to the distinction in England between the jurisdiction of chancery over the personal estate and the real estate of infants, causing courts of chancery to be more reluctant with regard to decreeing the sale of the latter, are very ably set forth by Judge MULKEY in the opinion in *Dodge v. Cole*, 97 Ill. 338, and by Judge BRICKELL in *Goodman v. Winter*, 64 Ala. 410; *Huger v. Huger*, 3 Des. 21; *Spencer v. Bank*, Bailey's Eq. (S. C.) 468; *Hale v. Hale*, 146 Ill. 227; *Hunt v. Long*, 90

Tenn. 445. While a few of our American courts have announced that chancery jurisdiction does not extend to decreeing a sale of infants' lands, yet in the majority of cases where the question has been squarely presented our courts have upheld the jurisdiction, especially where the question has been carefully discussed. Very learned discussions will be found in *Dodge v. Cole*, 97 Ill. 338. We also invite the court's attention to the following decisions, as sustaining the proposition for which we contend: *Thorington v. Thorington*, 82 Ala. 489; *Ex parte Jewette*, 16 Ala. 409; *Goodman v. Winter*, 64 Ala. 410; *Gassenheimer v. Gassenheimer*, 108 Ala. 651; *Rivers v. Durr*, 46 Ala. 418; *Bulow v. Buckner*, 1 Rich. Eq. Cases 401; *Bulow v. Witte*, 3 S. C. 308; *Huger v. Huger*, 3 Desaus (S. C.) 21; *Spencer v. Bank*, *Bailey's Eq.* (S. C.) 468; *Clifford v. Clifford*, 1 Desaus (S. C.) 115; *Stapleton v. Langstaff*, 3 Desaus (S. C.) 22; *Shumard v. Phillips*, 53 Ark. 37; *Snowhill v. Snowhill*, 3 N. J. Eq. 20; *Thompson v. Mebane*, 4 Heisk. (Tenn.) 370; *Hunt v. Long*, 90 Tenn. 445; *Case of G. C. Brown*, 8 Humph. (Tenn.) 200; *Jones v. Sharp*, 56 Tenn. (9 Heisk.) 660; *Harris v. Richardson*, 4 Dev. (N. C.) 279; *Williams v. Harrington*, 33 N. C. 616; *Smith v. Sackett*, 10 Ill. 534; *Allman v. Taylor*, 101 Ill. 185; *Ames v. Ames*, 148 Ill. 322; *Hartman v. Hartman*, 59 Ill. 103; *Lynch v. Rotan*, 39 Ill. 14; *Dorsey v. Gilbert*, 11 Gill & J. (Md.) 87; *Downin v. Sprecher*, 35 Md. 475; *Taylor v. Peabody Heights*, 65 Md. 388; *Johns v. Smith*, 56 Miss. 727; *Sharp v. Findley*, 59 Ga. 722; *Thomason v. Phillips*, 73 Ga. 140; *Overby v. Hart*, 68 Ga. 493; *Dampier v. McCall*, 78 Ga. 607; *Wood v. Mather*, 38 Barb. (N. Y.) 482; *In re Salisbury*, 3 John. C. 347 (By Chancellor Kent); *Anderson v. Anderson*, 44 N. Y. 249. See also: *Story on Eq. Juris.*, 1059, 1060 and 1357; 2 *Kent's Commentaries*, 230; 1 *Fonblanque's Eq.*, ch. 11, sec. 5, note f. We have, after a diligent examination of the authorities to the contrary, not been able

to find one, either among the judicial decisions or the text-writers, where it has been attempted to base a contrary decision upon any independent reason—they have been merely a blind following of English decisions, without observing that the English decisions were founded on substantial reasons which do not exist in this county. The first instance of this question in Missouri was in the case of *Kearney v. Vaughn*, 50 Mo. 284. There plaintiff's title depended upon the validity of a decree of the Court of Common Pleas in 1859, ordering the sale of property of certain minors. The court there leaves the question undecided as to whether chancery jurisdiction extends to decreeing a sale of infant's lands, but with a decided tendency towards supporting the jurisdiction. We submit, however, that in sustaining plaintiff's title the court necessarily held that the court which rendered the decree had the jurisdiction so to do, for if it was lacking in jurisdiction its decree would be a nullity, just as though it had never been rendered, and would neither be a bar to the minors or to strangers. We also call the court's attention to *Wood v. Boots*, 60 Mo. 546; *Castleman v. Relfe*, 50 Mo. 583; *Hamer v. Cook*, 118 Mo. 476.

Norton, Avery & Young, Frank Howell and Barclay, Shields & Fauntleroy for appellants in reply.

(1) To respondents' claim that the "decree" may be "supported under the original jurisdiction of the circuit court of Lincoln county as a court of chancery" we reply, first, that it is a grave error to suppose that any general or inherent power exists in courts of chancery (independent of statute) to sell the land of infants for reinvestment. *Rogers v. Dill*, 6 Hill 416; *Pierce, Admr. v. Trigg's Heirs*, 10 Leigh 419; *Bent v. Railroad*, 3 Pac. 721; *Onderdonk v. Mott*, 34 Barb. 106; *Adams, Equity*, 285; *Schouler, Dom. Rel.* (5 Ed.), sec. 356; *Whitehead v. Bradley*, 13 S. E. 196; *Bispham*,

Equity (6 Ed.), sec. 529; Garmston v. Gaunt, 1 Colly 577. The Code of Procedure does not enlarge the jurisdiction of equity. Carrico v. Tomlinson, 17 Mo. 501. (2) We reply, secondly, that even if such general power existed in chancery, it would not include power to sell and dispose of contingent interests in remainder of the minors in this case under the Shelton will. Stewart v. Griffith, 33 Mo. 24; Lomax v. Lomax, 11 Vesey 48; Wilson v. Fisher, 172 Mo. 10; Errat v. Barlow, 14 Vesey 202; Putnam v. Story, 132 Mass. 205; Roundtree v. Roundtree, 26 S. C. 450. (3) We reply, thirdly, that a long course of legislation in Missouri, *in pari materia*, discloses uniform legislative intention and expression contrary to the theory that such inherent jurisdiction in equity existed, for if such theory were correct, the hundreds of special acts enacted to authorize the sale of infants' lands would have been useless and unnecessary. The fact of their enactment demonstrates the legislative negation of any such inherent power in our courts of equity as respondents assert. (4) We reply to the claim of jurisdiction in this case that jurisdiction to support a decree or judgment is wanting where the court has not power to deal with cases of the general class in question, or where the decree is beyond or in excess of the authority of the court in a case of that class. Wilson v. Lubke, 176 Mo. 217; Story, Eq. Pl. (8 Ed.), sec. 10; Williamson v. Berry, 8 How. 542; Shriver's case, 2 How. 43; State ex rel. v. Guinotte, 156 Mo. 527; State ex rel. v. Elkin, 130 Mo. 90. Passing beyond the line of jurisdiction renders supposed judicial action void both at law and in equity. Ex parte Lange, 18 Wall. 175; Thompson v. Whitman, 18 Wall. 468.

VALLIANT, J.—Ejectment for certain land in Lincoln county. Charles M. Shelton was the common source of title; he died in 1848, leaving a wife but no

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child, and leaving also a will by which he devised the land in question to his wife Jane S. Shelton for life, remainder to the "heirs of her body." After the death of the testator his widow married Joseph M. Heady by whom she had six children, Mary, Charles, Laura, Sarah, Annie and Joseph W. Mary married John Carson and died before her mother, leaving two children, who are plaintiffs in this suit; Laura married Hawley Chappel and died before her mother, leaving three children, who are also plaintiffs. Jane, the widow of Charles M. Shelton, afterwards the wife of Joseph M. Heady, died in 1900; the plaintiffs are the surviving children and grandchildren above mentioned, and are the only heirs of her body. Plaintiffs claim title under the will of Charles M. Shelton.

Defendants claim title through a sale of the land made under a decree of the circuit court of Lincoln county in 1871. The pleadings in that case were not in evidence and it is said in the brief of counsel that they were lost and therefore could not be produced, but the decree was in evidence and from it the following appears: The plaintiffs were Joseph M. Heady and Jane his wife, and the defendants were their above-named children, all of whom were then living and all of whom were minors except Mary. The decree recites that all the defendants were personally served with process, that Mary appeared by her attorney and the minors by their guardian *ad litem*. The court, after first finding that the land (describing it) belonged to Shelton in his lifetime and was by his will devised to his wife for life, remainder to the heirs of her body, then finds "that it will conduce to the interest of the defendants, who are the heirs of the body of the said Jane S. Shelton, now Jane S. Heady, to sell the said real estate and to invest it in other real estate more productive and beneficial to said defendants." Then the decree goes on to recite that the court finds that

Joseph M. Heady owns certain other land in that county, describing it; thereupon it was decreed that Joseph M. Heady be appointed commissioner to sell the Shelton land for not less than \$10,000, and for the purpose of securing to the defendants the payment of the purchase money it was decreed to be a lien in their favor on the land owned by Heady, at least that is what respondents think it means, but if so there is a mistake in the description. The date of the decree is March 28, 1871.

Defendants' next offer was a deed from Joseph M. Heady, the commissioner, under the decree conveying the land to David H. Rashback, trustee, reciting that it was sold for \$10,007.46, and that Rashback had on the day of the date of the deed paid the commissioner \$6,000, the balance due on the sale. The deed was dated September 20, 1878, more than seven years after the date of the decree. There was no report of the sale to the court for confirmation, but the deed was acknowledged in open court on the date last-named. After this came other deeds purporting to bring the title, except as to an undivided one-eleventh, down to the defendants. The judgment was for the defendants and plaintiffs appealed.

I. When the decree was offered there were some objections interposed, chief among which was its alleged invalidity for lack of jurisdiction in the court, and also because it appeared on its face to have been altered by erasure and interlineation.

The question of jurisdiction in the circuit court in 1871 to render the decree is the first serious question in the case.

At the date of the rendition of this decree there was a statute which authorized the circuit court to order a sale of a minor's real estate for investment in stocks or other real estate when it should appear to the court to be for the benefit of the minor to do so. [G.

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S. 1865, p. 470 secs. 34, 35.] The procedure there prescribed was that the guardian or curator of the infant should petition the circuit court setting forth the condition of the estate and the facts and circumstances which were deemed to render such a proceeding desirable or necessary, whereupon the court should investigate the matter and "if after full examination on the oath of disinterested and credible witnesses" the court should find that it would be to the interest of the ward, it might make the order, first, however, requiring the guardian or curator to give bond and security for the faithful discharge of the duty and to account for the proceeds of the sale.

The same is substantially the statute law of the State now, except that the jurisdiction is now lodged in the probate court instead of the circuit court. [R. S. 1899, secs. 3510, 3511.]

It is conceded that the circuit court in making the decree now in question did not proceed under those statutory provisions, but was assuming to act under its general jurisdiction as a court of equity, and the contention of respondents is that the authority for the decree is found alone in the body of equity jurisprudence.

Since the pleadings in the case are not in evidence we can only ascertain what they contained as their contents are reflected in the decree. By the decree we learn that the life tenant and her husband were the plaintiffs and that her children, the prospective contingent remaindermen, were the defendants. The decree starts out with the recital that process was duly served on all the defendants, that a guardian *ad litem* was appointed by the court for the minors and they all appeared, and all the issues were duly submitted to the court. Then, as if in response to those issues, the court finds that by the will of Shelton the plaintiff Jane took a life estate in the land, and the heirs of her body

the remainder, that the defendants were the heirs of her body and that it would be to the interest of the defendants to sell the land and invest the proceeds in other real estate. Upon those findings the decree was made, to sell the land and secure the proceeds by lien on other lands. There was no order to reinvest.

From this it appears there was no necessity suggested for the sale of the land, no apprehension of imminent destruction of title or loss of the property, not even a necessity for its sale for the support and maintenance of the children, but the decree rests solely on the foundation that it would conduce to the interest of the defendants to sell this land and invest the proceeds in other land—a mere business speculation. If the decree can be upheld it must be so on the ground that at that time the circuit court by virtue of its general equity jurisdiction had authority to appoint a commissioner and clothe him with power to enter into such a business speculation with the infants' real estate in the hope and for the sole purpose of bettering the infants' financial condition. There are some authorities in this country that hold that a court of equity may do that, but the weight of authority is to the contrary and we think reason and judicial prudence are against the recognition of such a power.

Counsel on both sides have referred us to some Missouri cases bearing on the subject.

In *Kearney v. Vaughan*, 50 Mo. 284, plaintiffs derived title through a sale of real estate of minors under a decree of a court of common pleas; this court held that, as against the defendants in *Kearney v. Vaughan*, who were strangers to the record in the case wherein the decree was rendered, the decree was valid. But the minors whose land was ordered to be sold under that decree were not parties to the suit of *Kearney v. Vaughan*, and their right to question the validity of the decree was not involved. The court after saying that

the proceeding under which the decree was rendered for the sale of the land was not a proceeding under the statute, said: "Under some circumstances, however, it has been held that a court of equity will order the sale of the real estate of minors, though it is not supposed that the general power exists independently of the statute. If this were a proceeding by the heirs to recover their property notwithstanding the sale, it would be necessary to scrutinize it, to examine the authority of the court to order it, and to see whether it could be sustained. But the defendants have no interest in that question; the heirs are not contesting, they are not made parties, and may be satisfied with the sale and be willing to abide by it."

Castleman v. Relfe, 50 Mo. 583, was a suit in equity by the purchaser at the guardian's sale to set aside the sale and cancel the purchaser's notes given for the purchase money on the ground that the proceedings in the circuit court wherein the decree of sale was rendered were so irregular that no title passed. Those proceedings were in the circuit court, under the statute, by the guardian for the sale of his ward's land, and there were some irregularities in the proceeding, among which was the fact that the sale had not been reported to and confirmed by the court, but it was held that although in a like proceeding in the probate court a report of the sale and confirmation thereof was necessary, since that was a court of limited jurisdiction, yet such was not necessary in the same kind of a proceeding in the circuit court because the latter was a court of general jurisdiction. In that connection the court used this language: "The circuit court is a court of general jurisdiction, and when it has acquired jurisdiction, however erroneous or irregular its proceedings may be, they are regarded as valid and binding until they have been reversed or annulled by suitable proceedings in-

stituted for that purpose and titles acquired by sales under them will be protected."

The language just quoted does not mean that every sale ordered by the circuit court because it is a court of general jurisdiction will be upheld until the judgment is reversed or annulled by suitable proceedings instituted for that purpose; it means that the judgment will be so upheld provided the jurisdiction of the court appears. In that case the court was proceeding to exercise the particular jurisdiction the statute had conferred and the validity of the judgment was assailed, not on the ground of want of jurisdiction, but of irregularity in the proceeding. In the case at bar the jurisdiction of the court over the subject is assailed.

In *Woods v. Boots*, 60 Mo. 546, this language occurs: "The power of ordering a guardian or curator to sell lands of the wards and invest the funds existed originally in the circuit court as a court of chancery." That language must be interpreted in the light of the context and in view of the subject to which it was applied. The court was not speaking of original equity jurisdiction, but of the jurisdiction originally conferred on the circuit court by this statute which we have been discussing, which was originally enacted in 1861 and was afterwards, in 1866, amended to confer the same jurisdiction, concurrently, on the probate courts of certain counties. The subject the court was considering was an order of the probate court authorizing a guardian to invest certain money belonging to his ward in certain real estate and it was claimed that the order was authorized by that statute. This court held that the statute did not authorize the order and that the guardian was liable for the money so invested as for a misappropriation. Whilst that case treats only of jurisdiction conferred by statute and is therefore no authority on the question of equity jurisdiction, the facts serve to illustrate the unwisdom and danger of such a juris-

diction as is now claimed. There the probate court had solemnly found it to be to the interest of the ward and therefore ordered the guardian to invest the ward's money in the land, which the guardian did, leaving a balance of the purchase money unpaid and a lien for its payment on the land so purchased; when the debt came due the ward was without means and the vendor could have his land back again and keep all the ward's money besides. The probate judge in that case was doubtless as conscientious and honest in his belief that he was acting for the best interest of the infant and as careful in guarding that interest, as the chancellor was in the case at bar, or as chancellors generally are when those whom they suppose have the interest of the minor most at heart apply for leave to sell and reinvest in any flattering scheme.

In *Hamer v. Cook*, 118 Mo. 476, is found this language and defendants quote it as sustaining their side of the question: "Again, it is the practice of the court of chancery to permit guardians, under the direction of those courts, to convert real property into personalty, and personalty in realty." That language was not there used to express the decision of the court upon any point in the case, because, as we will see by reference to the whole opinion, the decree then under review was based on what the trial court had construed to be a devise of land in trust for a particular purpose and the order of sale was to carry that purpose into effect, and the point decided by this court was that the circuit court had jurisdiction to construe that will and if it created a trust to enforce the trust, that such a decree, though it may have been based on an erroneous interpretation of the will, was yet within the jurisdiction of a court of equity and therefore not subject to a collateral attack. The decree, the validity of which was assailed in that case, was rendered in the circuit court of

DeKalb county and rested on the following facts: Lewis Hamer owning certain land died leaving a widow and children and leaving also a will devising and bequeathing all his estate real and personal to his wife for life for her support and maintenance and to raise, support, maintain and educate his children and at her death what was left was to go to his children. The widow married again and afterwards she and her husband filed suit in the circuit court against the children, some of whom were minors, praying for authority to sell the land for the purpose of carrying out the provisions of the will. It was alleged in the petition that there was no personal property then remaining, that but a small portion of the real estate was improved, yielding not more than sufficient to pay taxes and leaving nothing for their support, "that the intention of the testator and the purpose of said will, as expressed in the same, cannot be carried out and effectuated without a sale of the real estate." On that showing the decree of sale was made, and it was in reference to the question of the jurisdiction of the court to render that decree that the language quoted was used. The parties assailing that decree contended that under the statute the county court alone had power to sell the land for the education of the minors, but this court held that it was a suit to obtain for the trustee authority to sell the land to yield the fund to carry out the purpose of the will and in that connection the court, per GANTT, P. J., said: "It was a part of the ancient and well-defined jurisdiction of the courts of chancery to construe wills and declare the limitations of trusts created thereby, and the creation of our county and probate courts has not divested them of this power. [Church v. Robertson, 71 Mo. 326.] And it is a familiar rule that a court of equity will never permit a trust to fail merely for the want of a trustee, and if no other trustee is designated, the courts of equity will take upon themselves the ex-

ecution of the trust. [Bank v. Chambers, 96 Mo. 459.]” Then in immediate connection follows the language first above quoted, after which the court said: “Under the allegations of the petition, then, the circuit court of DeKalb county was asked as a court of equity to construe a will, declare a trust, and enforce it by a sale of those lands.” That decision therefore bottoms itself on a ground of equity jurisdiction independent of the ground on which it is sought by defendants in the case at bar to rest the jurisdiction of the circuit court of Lincoln county to render the decree which these plaintiffs now assail.

We find nothing in our decisions to sustain the position of defendants on this question.

There is nothing in the character of this subject that especially distinguishes it as a creature of equity. That which we technically call equity, in contrast with what we technically call law, was of natural origin and growth in our jurisprudence, springing up to meet the imperative demands of justice at places where the law was inadequate to the occasion. “Equity follows the law,” it does not override or subvert the law, it comes to the aid of the law when the law, on account of its rigid cast, is unable to adjust itself to the demands of justice. Equity sits silent in the courts as long as the law is able to meet the demands of justice; it is silent to the call of a mere legal right, its voice is heard only when a cause, not contrary to law, well founded in right and justice, would suffer without its aid. It is cold to a mere legal demand but warm to the prayer of helpless justice. It aids the law but is not officious in its services, it does not take hold of a case merely because it has peculiar power.

Now what was there in the nature of the case in which the circuit court of Lincoln county in 1871 undertook to exercise its power as a court of equity that especially appealed to equity for aid? What cry of

suffering justice was heard by the chancellor? The case laid before the court by the plaintiffs in that case, stripped of superfluities, was simply this: We the plaintiffs think we can make money for these minors (as well as ourselves) by selling their contingent interest in this land and investing the proceeds in other lands and we ask the aid of a court of equity to enable us to enter into that speculation. It is said in the able brief of the learned counsel for defendants that equity has always exercised jurisdiction over the estates of minors. That is so and nothing we are now saying will deny to courts of equity their original jurisdiction in the case of minors and the protection of their property interest. But equity distinguishes between the shield and the sword; to protect the estate from a danger which the infant, because of his tender years, is unable to defend against, is one thing, to commission some one to go into the field of trade selling and buying on account of the infant is another thing. Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and every thing whatsoever with the estate of a minor, *quia* minor—the act to be valid must be based on some equitable principle.

If jurisdiction in chancery to sell the land of infants for the mere purpose of investing in other property ever existed, there is no necessity for its exercise in Missouri, because under the statute above quoted ample power to do that, under the safeguards in the statute itself prescribed, is given. That statute was in force when this decree was rendered in 1871 (Laws 1860-61, p. 98), and is substantially the statute at present except that the jurisdiction is now given to the probate court. [R. S. 1899, sec. 3510.] It is true, as contended by defendants, that the mere creation by statute of a legal remedy where none existed before,

or the mere conference of the same jurisdiction on a court of law, does not take away the jurisdiction in equity unless the statute so declares or so necessarily implies, but the enactment of such a statute without making any reference therein to the jurisdiction of courts of equity and the continuance of the statute for over forty years in our law books, show at least the opinion of the Legislative Department of the Government on the question and obviate the necessity of a judicial resolving of a doubtful question in favor of the jurisdiction of a court of equity, or of establishing now for the first time a precedent in this State for the exercise of such a jurisdiction. If infants were suffering in this State because under the rigid forms of law their guardians could not sell their lands to invest the proceeds in flattering schemes that promise large gains, our courts might search for a precedent in equity to allow them to do so, but as our statute law now is there is and has been for forty years no necessity for such a stretch of judicial power.

In the briefs before us this question of equity jurisdiction is discussed with great learning and ability on both sides, and, if time and space were of no consideration, we would like to follow the counsel and review in this opinion, as we have followed them and reviewed in the library, the authorities which they have respectively arrayed. We must, however, be content to refer the inquirer for learning on this subject to the briefs of the counsel which will be reported with the case and to give, with but little further discussion, our conclusion, viz: that the decided weight of authority both in England and America is against the contention that courts of equity have jurisdiction to decree a sale of a minor's land for the mere purpose of reinvesting the proceeds.

Counsel for defendants seem to concede that the

modern English decisions are against their contention and that at least a large and respectable list of American decisions are also against them, yet they say that those American courts which have so held have simply followed the lead of the English courts without questioning the firmness of the ground on which the English courts rest their decisions and without observing the difference that exists between the two countries in the tenures of real property and the constitutional restrictions on legislation. Those distinctions are referred to also in an able opinion of the Illinois court, *Dodge v. Cole*, 97 Ill. 338, on which defendants strongly rely. In that case the Illinois court upheld the decree there assailed on the ground that it was within the scope of general equity jurisdiction, yet in the opinion the court, l. c. 355, said: "And it must be confessed that the decided weight of authority establishes the proposition that a court of chancery has no inherent power to decree the sale of lands belonging to lunatics, idiots, infants, or others laboring under disabilities."

We discover no essential difference between the foundation on which the English decisions are rested and that on which the decisions of our courts rest, or any reason why the same principle of equity jurisprudence is not as applicable to the conditions in one country as in the other.

There is, as the learned counsel contend, in our law an absence of that jealousy against alienation of real estate that we observe in the English law. But that jealousy applies in England with equal force to the alienation of land held by a person *sui juris* as to that held by an infant. There is no difference, so far as the inalienable feature of the English law which we are now considering is concerned, between land held by a person *sui juris* and land held by a minor; if the inalienable feature exists in the title by which the land is held it affects the one as well as the other. If in

England a minor holds such title to land that, if he were of age, he could sell it, the only reason he cannot sell it there is the same reason that a minor in like case in this country could not sell his land, that is, not because of the spirit of jealousy in England against the alienation of real estate, but because he has not reached the age of discretion.

It is also true that in this State and some other States of this Union there are constitutional limitations on the power of the Legislatures to pass special acts to authorize the sale of particular minors' estates, and there is no such restriction on the power of the British Parliament. But our General Assembly is as free as the lawmakers of England to pass a general law to cover all such cases and it has done so in terms as ample as could be conceived.

II. There are other questions discussed in the briefs but in view of the conclusion we have reached on the main question they are of minor importance and need only to be briefly mentioned.

Under the Shelton will the land was devised to the widow for life with remainder to the "heirs of her body"—not the "issue of her body"—as in *Tindall v. Tindall*, 167 Mo. 218. The widow and her second husband as plaintiffs brought the suit against their children then living; of course she had no heirs at that time because she was living, her children had then only contingent interests depending on outliving their mother, two of them never became her heirs because they died before she did and their children who did become heirs of her body were not born until years after the decree was rendered. These latter were not bound by the decree, even if the others had been, because they derived their title, not by inheritance from their mother in whom no title ever vested, but directly from the will as being heirs of the body of their grandmother.

III. The decree in question undertook to create a lien upon certain land therein said to be owned by Joseph M. Heady in favor of the children whose land Heady was to sell, to secure them in the purchase money. That was in 1871. There is no evidence that any effort was ever made by the children to enforce any such lien. In January, 1886, Joseph M. Heady and wife divided the land owned by him among their children, giving each a deed to his or her share, wherein it was expressed to be a deed of gift made pursuant to their desire to make an equal division of the land among their children. In March of that year Heady died, his estate was insolvent. By the acceptance of those deeds, the defendants in their answer say, the children of Heady ratified his act as commissioner in selling their land. We find nothing in the evidence to justify that plea. Heady may at that late day have reached the conclusion that he had wronged his children and that may have been his secret motive for deeding to them his land before his death, but if so it was locked in his own breast, the deeds make no reference to the old transaction and the evidence was that there was nothing said on the subject, that there was no agreement or understanding between the father and the children that these deeds were given to compensate them for their interest in the Shelton land which he had sold. Whether the children could hold the land as against the creditors of their father's estate was a question between them and the creditors; it is one in which these defendants have no interest.

There are still other questions discussed in the briefs, but in view of the conclusions above stated they are of no importance.

The life tenant died in December, 1900, and the plaintiffs, the remaindermen, brought this suit in February, 1901.

Under the evidence in the case the judgment should have been for the plaintiffs.

The judgment is reversed and the cause remanded to the circuit court of Lincoln county to be retried in accordance with the law as in this opinion expressed.

All concur.

KATIE A. MOORSHEAD, Appellant, v. UNITED RAILWAYS COMPANY OF ST. LOUIS et al.

In Banc, March 30, 1907.

1. **LEASE: Power of Named Lessee to Acquire.** By an ordinance of the city of St. Louis several railroad companies therein named, "and their successors and assigns, are hereby severally authorized to sell, convey, or lease, if found desirable, their property, rights, privileges and franchises now owned and held, or herein granted, respectively, to any of the said companies named in this section, or to the St. Louis Transit Company, its successors or assigns," and "the said company and its successors and assigns so acquiring such property, rights, privileges and franchises, is hereby authorized to acquire, hold and enjoy the same during the term of this ordinance." The United Railways Company was not one of the companies named, but it acquired by purchase all the properties of those named, including the railway on which plaintiff was injured, and undertook to lease all the properties so acquired to the Transit Company. *Held*, that ordinance authorized a lease to the Transit Company. The city had authorized the Transit Company to acquire said railway by lease, and if the original owner could grant the lease to that company, so could a lawful purchaser do so.
2. ———: ———: **Successors and Assigns.** The consent of the city to said lease is not dependent on the use of the words "successors and assigns" after the words "the Transit Company," but is to be found in the words of the ordinance which named the Transit Company itself as the lessee.
3. ———: **By One Railway Company to Another: Good Faith.** If an agreement by which one street railway company transferred all its properties, privileges and franchises to another, was not entered into in good faith and for the purpose declared, but to defeat its creditors or to enable its properties and fran-

chises to be held by such other for its benefit in a manner that would screen it from judgments and relieve it of responsibility, it will be held liable without regard to the contract. But such an issue would be for the jury unless the instrument itself, or facts in evidence, show the truth beyond dispute.

4. ———: ———: **Agent: Partners.** The United Railways Company of St. Louis by agreement transferred to the Transit Company not only the right to operate its railways for a period of forty years, but every franchise held by it except the franchise to be a corporation, all its property, real, personal and mixed, all income derived from its bonds and stocks, and the money it had on hand at the date of the agreement and what it might receive afterwards by the sale of unusable property; and besides binding itself to operate the railways, the Transit Company bound itself to do various acts, such as keeping them in repair, making extensions and improvements and meeting the interest on bonded obligations, and to pay to the other company for the possession and use of the property during the stated period, the payments to be made at regular intervals and bearing all the characteristics of a fixed rent charge; and the contract provided for the reversion of the property to the grantor at the end of the term, and for a re-entry if the grantee defaulted in the performance of its covenants during the term. *Held*, that by the agreement the United Railways Company did not constitute the Transit Company its agent, nor did the agreement make them partners, but it was a lease.
5. ———: ———: **Goods, Etc.** Goods, chattels and franchises may be leased as well as lands and tenements.
6. ———: ———: **Liability of Lessor for Lessee's Torts.** Where the statute gives a street railway company express power to lease all of its properties to another street railway company, as the statute of this State does, the lessor is not liable in damages for injuries to a passenger resulting from the negligence of the lessee, unless such liability is expressly reserved in the statute. [Distinguishing *Markey v. Railroad*, 185 Mo. 348.]
7. **STATUTES: Time of Taking Effect: Revision Session: Lease.** A statute with an emergency clause, approved June 19, 1899, authorizing one street railway company to lease all its properties to another, went into effect at once, although it was printed in the Revised Statutes of 1899 as a new section.
8. ———: **Lease: Companies Already Organized.** The act of June 19, 1899, by section 15 conferred on any existing street railway company which filed with the Secretary of State its acceptance of the act and paid the required fees, the power to lease its properties.

9. ———: ———: ———: **Acceptance Shown.** Where plaintiff seeks to hold liable for her tortious injuries the street railway company which has leased its properties to another company, and for the purpose of fastening liability upon it introduces the lease in evidence, the burden is not on the company to show that it has filed with the Secretary of State its acceptance of the provisions of the act authorizing it to make the lease. In such case, in the absence of proof to the contrary, the presumption is that both companies have complied with the provisions of the statute.
10. **LEASE: To Railway Company: Torts: Liability of Lessor: Statute.** When the lease of the franchises and railways of one street railway company to another is authorized by statute, the leasing company remains liable to third persons for the torts of the lessee, if the statute so says; and where the lease is not authorized by statute, the lease does not relieve the lessor of its public duties and responsibilities, but the lessor remains liable for the torts of the lessee. But where the statute does authorize the lease, without any reservation in the act of liability on the part of the lessor to third parties, for the torts of the lessee, the lessor is not liable for those torts. And where the statute expressly authorizes one street railway company "to sell, lease or dispose of by any other lawful contract, to any other street railway company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character and description," the lessor is not liable for the lessee's negligent injury of a passenger in the operation of a street car, and the General Assembly did not intend that it should be. The right to dispose of its corporate franchise being given to the grantor, it necessarily follows that it was not to be held liable for the torts of the grantee; and that conclusion is inevitable where the lessor is given the right to dispose of all its properties.
11. ———: ———: ———: ———: **Public Policy.** The very highest policy of a State is its statutory law. But the question of the liability of the lessor for the torts of the lessee is not to be determined by public policy. It is not a question of public policy, but of legislative intention—of statutory construction.
12. ———: **To Irresponsible Company: Liability of Lessor for Lessee's Torts.** The mischief which it is supposed by some courts that would result if leasing railway companies are not held responsible for the torts of the lessee, namely, that leases to irresponsible companies would be made for the purpose of evading liability, is met in this State by two answers: first, if

that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible; and, second, our statutes require one-half of the capital stock of a street railway company to be subscribed and ten per cent of the subscription to be paid up in cash, and to that extent, at least, the lessees would have to start with assets.

13. ———: Incidents. One of the incidents of a lease, unless there are covenants to the contrary, is that if the demised property (lands or chattels) is turned over to the lessee in good condition, the lessor is not thereafter liable to third parties for damages resulting from the negligent use of the property by the lessee; and where the statute empowers the lessee to operate the demised street railway, unless the power of control is reserved by the lessor in the lease, the operation will be without any interference by the lessor, and that necessarily means that the lessor is not answerable to a passenger negligently injured on a street car operated by the lessee — the injury being due to the sudden starting of that car too quickly after the passenger had boarded the car and thereby throwing her down.

Transferred from St. Louis Court of Appeals.

AFFIRMED.

R. P. & C. B. Williams for appellant.

(1) A railroad corporation, without the express consent and authorization of the lawmaking power of the State, cannot make a lease of its property or franchises to another corporation, such a contract being *ultra vires* and void. As between the parties, such a contract is non-enforceable, and, as to the public, for torts committed in the use of the leased property the lessee is treated as the agent of the lessor, both being jointly liable. *Railroad v. Brown*, 17 Wall. 450; *Railroad v. Railroad*, 130 U. S. 1; *Railroad v. Railroad*, 118 U. S. 290; *Thomas v. Railroad*, 101 U. S. 71; *Railroad v. Bridge Company*, 131 U. S. 371; *Hart v. Railroad*, 209 Ill. 414; *McCoy v. Railroad*, 36 Mo. Mo. App. 445; *Markey v. Railroad*, 185 Mo. 348; 2 *Elliott on Railroads*, sec. 430; *Dean v. Railroad*, 97 S. W. 910. (2) Even though a legislative consent and

authorization be given to a railroad corporation to execute or to accept a lease, such legislative permission cannot have the effect of relieving the lessor from the performance of its duties and obligations to the public, but simply validates the lease as between the parties, and the lessor remains liable to the public for the negligent acts of the lessee, the same as before the lease, unless the enabling statute contains an express exemption from liability. *Railroad v. Hart*, 209 Ill. 414; *Harden v. Railroad*, 129 N. C. 354; *Brown v. Railroad*, 131 N. C. 445; *Logan v. Railroad*, 116 N. C. 940; *Railroad v. Crane*, 113 U. S. 424; *Braslin v. Somerville*, 145 Mass. 64; *Quested v. Railroad*, 127 Mass. 204; *McCabe's Adm. v. Railroad*, 112 Ky. 861; *Singleton v. Railroad*, 70 Ga. 464; *Beach, Private Corporations*, sec. 366; *Chicago Union Traction Co. v. Stanford*, 104 Ill. App. 99; *Railroad v. Meech*, 163 Ill. 305; *Railroad v. Balkwill*, 195 Ill. 535; *Railroad v. Doan*, 195 Ill. 168; *Smith v. Railroad*, 130 N. C. 344; *Balsey v. Railroad*, 119 Ill. 68; *Tillet v. Railroad*, 118 N. C. 1031; *Chollette v. Railroad*, 4 L. R. A. 135; *Par v. Railroad*, 43 S. C. 197; *Bower v. Railroad*, 42 Iowa 546; *Lee v. Railroad*, 116 Cal. 97; *Bean v. Railroad*, 63 Me. 295; *Lakin v. Railroad*, 13 Ore. 436; *Nelson v. Railroad*, 26 Vt. 721; *Daniels v. Hart*, 118 Mass. 534; *Tackers v. Railroad*, 71 Mich. 645; *Nagle v. Railroad*, 3 S. E. 369; *Willard v. Railroad*, 124 Fed. 196; *Railroad v. Dunbar*, 20 Ill. 623; *Driscoll v. Railroad*, 65 Conn. 230; *Harmon v. Railroad*, 28 S. C. 401; *Hawkins v. Railroad*, 119 Ga. 159; *Phelps v. Steamboat Co.*, 131 N. C. 12; *Pierce v. Railroad*, 124 N. C. 83; 5 *Thomp. Corp.*, sec. 5884; *Whitney v. Railroad*, 44 Me. 362; *Stearns v. Railroad*, 46 Me. 95; *Hart v. Railroad*, 33 S. C. 427; *Bank v. Railroad*, 25 S. C. 216; *Railroad v. Morris*, 68 Tex. 49; *Cogswell v. Railroad*, 5 Wash. 46; *Munz v. Railroad*, 64 L. R. A. 222; *Aycock v. Railroad*, 89 N. C. 330; *Benton v. Railroad*, 122 N. C. 1007; *Railroad v. Ferguson*, 9 Tex. Civ. App.

610; Railroad v. Allen, 39 S. W. 125; Railroad v. Ellet!, 132 Ill. 660; 23 Am. and Eng. Ency. Law, 784; Railroad v. Owen, 75 S. W. 579; Railroad v. Culberson, 10 N. E. 706. (3) The instrument in question is not a lease, but it resembles more "a partnership, an operating contract," or a "trust arrangement." In either case the Transit Company would be held as the agent of the United Railways Company. The essential elements of a lease—a determinate estate given the lessee, and absolute and exclusive ownership in the lessee of the term—are wanting in this instrument. Galveston v. Davis, 4 Tex. Civ. App. 468; Driscoll v. Railroad, 65 Conn. 230; St. Joseph, etc., v. St. Louis, etc., 135 Mo. 173; Railroad v. Cox, 102 Fed. 825; Archer v. Terre Haute, 102 Ill. 493; United S. Rolling Stock v. Potter, 48 Iowa 56.

George Safford, George H. Shields, Thomas T. Fauntleroy and Shepard Barclay also for appellant.

(1) The document is not a lease. As to third persons it is a contract of agency or partnership, nothing more. We hold that, under the elemental principles of the law of partnership and of agency, this so-called "lease" (as to third persons) either made these companies partners or made the Transit Company an agent to operate the lines of railway for the benefit of the other company or of both the parties interested. Brownlee v. Allen, 21 Mo. 123; York, etc., Co. v. Winans, 17 How. 30; Galveston, etc., Co. v. Davis, 23 S. W. 301; Cin. & C. Co. v. Sleeper, 5 Ohio Dec. 196; L. & N. Co. v. Breeden, 64 S. W. 667; Jones v. Penn. Co., 19 D. C. 178; Driscoll v. Railroad, 65 Conn. 230; Railroad v. Bouknight, 70 Fed. 442; Slater v. Clark, 68 Ill. App. 433. (2) No municipal assent to the transfer in question is shown by the evidence. The ordinance fails to authorize a transfer of the franchise of the United Rail-

ways to the St. Louis Transit Company, as to that part of the Transit Company's line where the accident in suit took place, which was on Geyer avenue between Jefferson avenue and Ohio avenue. Const., art. 12, sec. 20. The municipal "assent" which the Constitution and the statute (R. S. 1899, sec. 1187) require is an assent to a definite and particular transfer. The assent must be express. It was held in a case directly in point that a franchise given by law to a certain company, "its successors and assigns," did not authorize a transfer so as to relieve of liability the lessor. *Railroad v. Oregonian Co.*, 130 U. S. 32; *Briscoe v. Railroad*, 40 Fed. 273. Ordinance 19738 purports to sanction a lease of the property and franchises of certain companies to the St. Louis Transit Company, "its successors and assigns;" but the United Railways was not named as one of the companies the lease of whose property was thereby sanctioned. The legislative authority needful to sustain a transfer of a franchise by lease affecting this class of property must, under our Constitution and statute (R. S. 1899, sec. 1187), be fairly clear and intelligible. It must be express authority. That authority is wanting here, as a reading of the ordinance demonstrates. No such authority will be implied. *Thomas v. Railroad*, 101 U. S. 71; *Peoria, etc., Co. v. Lane*, 83 Ill. 448. Another conclusive reason why ordinance No. 19738 cannot avail to prove municipal assent to the "lease" is that by the terms of its last section (10) it only applies to such companies as filed their "written acceptance" of all its conditions, within sixty days after the date (March 20, 1899) of approval of the ordinance. That limit of time has long since elapsed, and there is no evidence that either company availed itself of the benefits the ordinance tendered to the companies within its purview. So neither can now take advantage of its terms. (3) The supposed statutory authority to lease does not declare the lessor absolved thereby

from the duty imposed by its franchise to operate, hence lessor remains liable. Where the leasing of such property is expressly authorized by law, the lessor remains liable for the proper performance of its duty to operate the railroad carefully, unless the law which confers the authority to lease declares that such transfer by lease relieves the lessor of the obligation and liability arising from its franchise. "While there is some conflict of authority, we think the great weight supports this conclusion." *McCabe v. Railroad*, 112 Ky. 816; *Harmon v. Railroad*, 28 S. C. 404; *Driscoll v. Railroad*, 65 Conn. 254; *Braslin v. Railroad*, 145 Mass. 68; *Logan v. Railroad*, 116 N. C. 946. On the principles declared in the foregoing decisions, the terms of the lease are immaterial, for it is not pretended that there is any Missouri law which goes further than to authorize a lease of the street railway property. In the absence of such a law applying to these defendants, there is a clear liability of the lessor in such a case as that at bar, for the servants of the lessees would be the agents of the lessor (as declared in the first instruction of the court). *Brown v. Railroad*, 27 Mo. App. 400; *Penn. Co. v. Ellett*, 132 Ill. 654; *West Chic. Co. v. Anderson*, 200 Ill. 329; *Anderson v. Railroad*, 161 Mo. 422; *McCoy v. Railroad*, 36 Mo. App. 445; *Price v. Barnard*, 65 Mo. App. 699; *Sinclair v. Railroad*, 70 Mo. App. 588; *Phelps v. Steamboat Co.*, 12 Am. Neg. Rep. 617, 42 S. E. 335. (4) The defendant companies have no statutory power to lease or to take a lease of such property; hence, the lessor remains liable for the operation of the lines. There is complete unanimity of authority to the effect that without legislative power to transfer such property by lease, a transfer of that sort leaves the lessor liable for negligent operation of the railroad by the lessee. 3 Wood's Railway Law, sec. 400; 2 Elliott, Railroads, sec. 469; 5 Thompson, Corps., sec. 5884; *Brown v. Railroad*, 27 Mo. App. 400. Both

the Transit Company and the United Railways Company are barren of any right to lease (or to receive a lease of) such property, because neither was organized since the enactment of article 3 of the General Corporation Law of 1899, conferring such power on companies of that sort. *Nelson v. Railroad*, 26 Vt. 717; *Abbott v. Railroad*, 80 N. Y. 30.

Boyle & Priest, George W. Easley and Edward T. Miller for respondents.

(1) The law of Missouri in force at the time of the execution of the lease authorized the lease. R. S. 1899, sec. 1187. (2) The lease shows compliance with this law by its recitals. The term of the lease was for forty years. The exclusive right to manage, use and operate the lines leased was granted by the lessor to the lessee. It must be borne in mind that the question we have under consideration is the negligence of a lessee who is in the entire possession and control of the operation of the property, and over which the lessor retains no control whatever. It must also be kept in view that the nature and character of the act producing the alleged injury has everything to do with determining the liability of the lessor. (3) We can best serve the court by classifying the cases cited for appellant, and eliminating such as deal with other questions than the operation of the road. The first class of cases to be eliminated is that in which the lease was held invalid because there was no statutory authority to execute the same. All the cases cited in point one of appellant's brief are cases of this character, where, for want of statutory authority to execute the lease, the same was held void. It is clear that such cases can have no application to the case at bar, because the statute authorizes the execution of the lease, so that cases of the character cited in point one must be eliminated from

consideration of this question. (4) Many cases cited for appellant in point two must also be eliminated, because there was no statutory authority for the execution of the lease. *Chollette v. Railroad*, 4 L. R. A. 135; *Munz v. Railroad*, 64 L. R. A. 222; *Railroad v. Crane*, 113 U. S. 424, must be left out of the consideration of this question, because the owner of the railroad owed the duty of operating a part of its line which had been abandoned without legislative right to do so. (5) All that class of cases cited in point three of appellant's brief must be eliminated from consideration of this court, because the lessor is made liable by statute. *Smith v. Railroad*, 61 Mo. 17; *Anderson v. Railroad*, 161 Mo. 411; *Maine v. Railroad*, 18 Mo. App. 388; *Brown v. Railroad*, 27 Mo. App. 394; *McCoy v. Railroad*, 36 Mo. App. 445. (6) Such cases as *Quested v. Railroad*, 127 Mass. 204, and *Daniels v. Hart*, 118 Mass. 534, must also be eliminated, because the very act authorizing the lease expressly provided that the lessor should remain liable for the acts of the lessee, notwithstanding the lease. There is nothing of that kind in the street car act of Missouri. Cases like *Lee v. Railroad*, 116 Cal. 97, must be eliminated from the consideration of this question, because there the liability arose from the lessor's failure to properly construct and maintain its road, which of course is an absolute duty attaching to the owner, as it does to all landlords. So of the case of *Bower v. Railroad*, 42 Iowa 546. It must be eliminated because the liability was fixed by statute. (7) To sustain the contentions, appellant's counsel has thrown together a great mass of cases, without attempting to in any manner classify them or in anywise show the particular ground upon which any of the cases rest. For instance, appellant's counsel cites 1 Beach on Corporations, sec. 366. Yet, if he had examined that section, he would have found that it applied to that character of liability which was im-

posed by law upon the owner of the property, like fencing, or some other duty imposed by statute, when, had the learned counsel read the very next section, he would have seen that he adopts the opinion of Judge BREWER, in *St. Louis Company v. Curl*, 28 Kan. 622. Counsel then cites a number of Illinois cases. When they are examined, it will be found that they are all based upon the early case of *Railroad Company v. Dunbar*, 20 Ill. 623, and that that case was decided upon the express ground that there was no legislative authority to lease, and, in the earlier cases following that, no distinction between legislative power to lease and the want of it was made or has ever been enforced. The Illinois court has simply failed to make that distinction, and holds to it, regardless of both principle and reason. 3 *Thompson on Corporations*, sec. 588. Even the Illinois courts have recently begun to distinguish between mere operation of the road and charter duties. *Railroad v. Eickman*, 47 Ill. App. 156. He then refers to the Georgia cases, and especially the case of *Singleton v. Railroad*, 70 Ga. 464. A very reputable author has said of this case that it "does not seem to accord with sound principle or authority upon this point." Mr. Freeman's note, 71 *Am. Dec.* 297. He also cites a line of Massachusetts cases, of which *Quested v. Railroad*, 127 Mass. 204, is a sample. An examination of all these cases will show that the act authorizing the lease expressly provided that it should not relieve the lessor from liability. The learned counsel likewise relies upon the case of *Nelson v. Railroad*, 26 Vt. 721. That case was decided by Judge REDFIELD, who, in the subsequent editions of his work upon railroads, distinctly states that the effect of legislative consent was not met or decided in the *Nelson* case. 1 *Redfield on Railways*, p. 618, note; see, also, *Arrow-smith v. Railroad*, 57 Fed. 176. (8) It has been said in a recent work upon street surface railroads that:

"Where a lease of a city railroad is duly authorized by law, the lessee only is liable for the negligence in its operation." Nellis on Street Surface Railroads, p. 266, sec. 16; 2 Elliott on Railroads, sec. 469; Hutchinson on Carriers, sec. 575; Pierce on Railroads, sec. 283; Patt. Ry. Acc. Law, secs. 130, 131; 5 Thompson on Corporations, sec. 5884, n.; Booth, Street Railway Law, sec. 425. The rule established in Missouri seems to follow the text-books above cited. *Brown v. Railroad*, 27 Mo. App. 400; *Speed v. Railroad*, 71 Mo. 310. (9) This question is not to be confounded with one where there is a lease of a domestic corporation in Missouri to a corporation of another State, because the statute which authorizes such a lease has the express reservation that the lessor "shall remain liable as if it operated the road itself." *Markey v. Railroad*, 185 Mo. 359. The following cases fully sustain the doctrines of the text-book above cited: *Pinkerton v. Penn. Traction Co.* (Sup. Ct. Pa.), 44 Atl. 284; *Heron v. Railroad*, 71 N. W. 706; *Hayes v. Railroad*, 74 Fed. 279; *Caruthers v. Railroad*, 54 Pac. 673; *Arrowsmith v. Railroad*, 57 Fed. 165; *Mahoney v. Railroad*, 63 Me. 68; *Scziwak v. Railroad*, 4 Pa. Dist. R. 339; *Railroad v. Washington*, 10 S. E. 927; *Evans v. Railroad*, 18 S. W. 493; *Buckner v. Railroad*, 18 So. 449; *Lakin v. Railroad*, 12 Ore. 436; *Miller v. Railroad*, 125 N. Y. 118; *Gwathney v. Railroad*, 12 Ohio St. 92; *Fisher v. Railroad*, 34 Hun 433; *Railroad v. Mangum*, 68 Tex. 342. (10) Cases may be found which broadly hold that even an authorized lease does not absolve the lessor from liability. In the main, those cases are founded on the breach of some duty which the lessor was bound to perform, and for the violation of which he was liable. Such a responsibility on the part of the lessor can only be avoided by some statutory exemption. These cases are good types of that class: *Nugent v. Railroad*, 80 Me. 62; *Railroad v. Curd*, 28 Kan. 622. But as to all injuries arising from operation

by the lessee, an authorized lease exonerates the lessor from liability. The several classes of cases are well collected by Judge LURTON in *Arrowsmith v. Railroad*, 57 Fed. 165. A careful reading of that opinion will enable this court to assign each case to its class, and thus simplify the question. (11) The question of whether the paper read in evidence by plaintiff is a lease cannot admit of much debate. The statute authorizes a lease. R. S. 1899, sec. 1187. The ordinance No. 19738, by section 3, authorizes the companies named therein, and their successors, or any line with which said companies, or any of them, intersect, to sell, convey or lease their lines to the St. Louis Transit Company. The ordinance No. 19352, by sec. 1, expressly provides that the Central Traction Company (now the United Railways Company), may "sell, lease or otherwise convey their property, privileges and franchises, and when so sold, leased or conveyed, the company acquiring the same shall have and enjoy all the rights and privileges herein granted and to acquire by lease or purchase the property and franchises and privileges of other street railways in St. Louis." Under these powers, and by virtue of votes of the shareholders and directors of the two companies, as recited in the lease, that document was executed. What is there in this whole transaction to lead to any doubt that that paper is a lease? What is a lease? 18 Am. and Eng. Ency. Law (2 Ed.), 598, 599. The term is definitely fixed by the *habendum*. The exclusive possession is granted the lessee for the term, as well as the right to operate. The rent reserved is fixed by paragraphs 2 to 7. Non-performance of the covenants of the Transit Company as to payment of rents reserved is made a cause of forfeiture. The lease is acknowledged and recorded in the same manner as any other grant or deed. What does it omit to make it a formal lease? We can conceive of nothing. The retention of title by the lessor

or provisions for reversion of the property are essential to a lease. *Edwards v. Noell*, 88 Mo. App. 440; 1 *Platt on Leases*, p. 18. Participation in a percentage of the gross receipts instead of fixed rental for the lease of a railroad does not render the lessor liable for negligence of the lessee in the operation of the road. *Phillips v. Railroad*, 62 Hun 232. The fact that the lessor was bound to pay for improvements made by the issue of its bonds to the lessee does not render the lessor liable. *Miller v. Railroad*, 125 N. Y. 118. The case of *Arrowsmith v. Railroad*, 57 Fed. 165, and the text-books cited by us, conclusively show that the great weight of authority holds that for negligence in the operation of the road by the lessee, no legislative exemption is necessary to absolve the lessor from liability. The rule that prevails in Illinois that while the authority to lease may exist, yet unless the act specially exempts the lessor from liability, the lessor remains liable for negligence in the operation of the road, is expressly denied by the Circuit Court of the United States sitting in that State. *Hayes v. Railroad*, 74 Fed. 283. (12) It is urged by appellant that it is not shown by the record that the United Railways Company of St. Louis and the St. Louis Transit Company accepted the provisions of section 1187, Revised Statutes 1899, and the ordinances of the city of St. Louis, authorizing the execution of the lease, and therefore the lease was executed without lawful authority. There are two answers to this proposition: First: "Acts done by a corporation which pre-suppose the existence of other acts to make them legally operative, are presumptive proof of the latter." *Bank v. Dandridge*, 12 Wheat. 64; 1 *Jones on Evidence*, sec. 50; *State ex rel. v. Kupperle*, 44 Mo. 158; *Ins. Co. v. Smith*, 73 Mo. 371; *Chouteau v. Railroad*, 122 Mo. 384. Second: The record shows that plaintiff offered the lease in evidence for all purposes, thereby vouching for the regularity of

its execution, and she cannot now be permitted to raise the question of want of lawful authority to execute it.

GRAVES, J.—The contention involved in this case is one of much interest; just what may be involved, more than the case under consideration, we have no means of knowing, but there are no doubt a number of cases dependent upon the views of this court in this case. As we gather it the question of the liability of the defendant United Railways Company has been up before four Federal judges and all of the several divisions of the circuit court of the city of St. Louis. In each case the exact question as to the character of the written instrument involved in this case was an issue. The four Federal judges, as well as the judges of the St. Louis Circuit Court, with the exception of two, have held that there was no liability so far as the United Railways Company is concerned. So much for the previous history of the question involved in this controversy.

This particular case comes here from the St. Louis Court of Appeals, owing to a minority opinion and a certification of the case under the Constitution, on the ground that the majority opinion was opposed to the opinion of this court in *Markey v. Railroad*, 185 Mo. 348. The principal majority opinion by that court was rendered by GOODE, J., which was concurred in by NORTON, J., in a separate opinion. The dissenting opinion is by BLAND, P. J. The magnitude of the issue as effecting this and other similar cases, has admonished us to a thorough investigation of the case and statutory law, tending to throw light upon the issue. Each of the opinions of the several judges of the St. Louis Court of Appeals bears the earmarks of thorough investigation and an able attempt to reconcile the case law. Here it will be well to say that the judges of the St. Louis Court of Appeals, while differing upon

other questions in the case, all agree that the instrument in writing involved in this case is a lease; and in this we think they are correct. The analysis of the case, both as to facts and law, is so thoroughly made by GOODE, J., that we adopt his opinion as the opinion of this court, save that we desire to add thereto the full text of the learned, and to our mind, unanswerable statement of the law of this case contained in 2 Elliott on Railroads, sec. 469. The language of the text-writer is as follows:

“Our opinion is that where the lease is executed under the provisions of a statute, in accordance with its requirements, is made to a company having authority to accept it, and is made in good faith and not for the purpose of transferring duties or obligations to an irresponsible party, the lessor company is not liable for injuries caused by the negligence of the lessee and not attributable to a breach of any public duty of the company that executed the lease. It must be assumed that in granting the authority to execute a lease the Legislature had in mind former statutes as well as the established rules of the common law. When power to execute a lease is conferred upon a corporation the Legislature must, in the absence of countervailing language, be deemed to intend to authorize the execution of such an instrument as the established law regards as a lease. The law enters as a silent factor into every contract, and hence of every lease it is an important element. The legal effect of a lease is to transfer for a prescribed period of time the possession and control of the property to the lessee. In authorizing the execution of a lease the Legislature grants the right to execute and carry into effect such an instrument as divests the lessor of possession and control and places it in the lessee to the exclusion of the lessor. The possession of the one party is excluded and that of the other is made complete by the legisla-

tive sanction. If a sale is made under valid legislative authority the company that acquires the property acquires an exclusive right and interest, and the lessee by virtue of the lease acquires a similar right so far as possession, control and management are concerned, for the term for which the property was leased. It cannot be doubted that a statute conferring general authority to sell means a complete and effective sale, and upon the same principle it must be concluded that the power to lease, unless qualified and limited by statute, is a power to make a complete and effective lease. A complete and effective lease certainly vests the right of possession, control and management in the lessee, since no other effect can be assigned such a lease without a direct and palpable violation of long and well-established principles of law. The lessor company does no wrong in executing a lease which the law of the land gives it full power to execute, so that in executing the lease there is no improper motive, no illegal act, nor any wrongful attempt to escape a duty. In granting authority to lease, the Legislature empowers the lessor company to transfer the duty of operating the road to the lessee, and in doing what the Legislature authorizes no rule of public policy is violated. It is, indeed, inconceivable that there can be a violation of a rule of public policy where the act done by a party is done under a legislative enactment and in accordance with its provisions. The cases which hold the lessor liable, although the lease is an authorized one, upon the ground that there must be an express exemption from liability in order to exonerate the lessor, concede, what could not be denied without leaving the domain of reason, that the Legislature may by express enactment exonerate the lessor, so that even upon that theory (which we believe to be unsound) the question, at bottom, is one of statutory construction. The courts which assert the theory mentioned

assume that in granting authority to lease, the Legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that in granting authority to execute a lease the Legislature conferred authority to execute an effective instrument with all the qualities and incidents with which the law invests a lease. If this be true then the lease does transfer possession and control from the one party to the other for the term of the lease, and the rights and obligations of the parties are such, and such only, as the law annexes to the relation of lessor and lessee. For negligence in managing and using the demised premises the lessor is not responsible. If it has performed its duty in constructing tracks and necessary structures it cannot be held responsible for the negligence of the lessee in employing incompetent servants, or in negligently handling trains, or in negligently overloading cars, or in negligently failing to provide a sufficient number of persons to manage trains, or for any negligence which relates solely to the mode of operating the leased road."

Judge GOODE's opinion follows:

"The petition alleges that plaintiff was hurt by the negligence of defendant's servants in suddenly and violently starting a street car on which she was a passenger, and while she was walking in the aisle to a seat. The action was instituted against the St. Louis Transit Company and the United Railways Company, and both are alleged to have owned and been engaged in operating the car and the line of railway on which it was running. The answers, filed by the two defendants, were both general denials. Evidence was adduced tending to prove the plaintiff was injured in the manner alleged, and that it resulted from the negligent conduct of the car's crew. It is conceded by the plaintiff that the evidence proved the car was operated by the

Transit Company under and by virtue of a written instrument executed by the two companies and purporting to be a lease. The only evidence relied on to fasten liability for the accident on the United Railways Company was this contract. The jury were instructed to return a verdict against both of the defendants, if they found the issues for the plaintiff. A verdict against both having been returned, the court sustained motions filed by the United Railways Company for a new trial and in arrest, on grounds equivalent to an express ruling that it was not liable to the plaintiff. Similar motions filed by the Transit Company were overruled. The result was, that plaintiff appealed from the order sustaining the motion of the United Railways Company and the Transit Company appealed from the judgment against it, but afterwards dismissed its appeal. Two ordinances of the city of St. Louis were put in evidence, one of which is relied on as giving the city's consent to the leasing by the United Railways of the line on which plaintiff was hurt, to the Transit Company. The title and two paragraphs of that ordinance will be copied. The title is as follows:

“ ‘An ordinance for the greater convenience and further transportation of passengers on the railways of the Cass avenue and Fair Grounds Railway Company, Citizen's Railway Company, Southwestern Railway Company, Southern Electric Railroad Company, St. Louis Railroad Company and Baden and St. Louis Railroad Company, respectively, and for that purpose authorizing change of motive power, the connection of railway tracks respectively, and the running of cars of one or more of said companies on the tracks of one or more of the other companies, and of such companies whose tracks may be intersected by the tracks of either of said companies, with authority to run ambulance, funeral, mail and express cars, and also authorizing if found desirable for said purpose, the sale, conveyance

or lease of the rights, privileges, franchises and property of one or more of said companies, and of the companies whose tracks may be so intersected, to another of said companies or to the St. Louis Transit Company, its successors and assigns, and the acquisition thereof, with authority to hold, enjoy and operate the same for a period expiring with the term of the franchise of the Southern Electric Railroad Company, as provided in City Ordinance Number fourteen thousand, eight hundred and thirty-seven, and to regulate the speed of cars, and authorizing the Southwestern Railway Company to extend its tracks on Gravois avenue from its intersection with the Morganford road to Bates street, and there to connect with the tracks of the Southern Electric Railroad Company, and extending the time for the completion of its tracks from Grand avenue on Chippewa street and Gravois avenue to the Morganford road, and the Southern Electric Railroad Company to extend its route on Loughborough avenue, Gravois avenue and Bates street, and to operate the same.'

"The first and third sections of the ordinance read:

" 'Whereas, it will be to the great advantage of passengers to have the tracks of the Cass avenue and Fair Grounds Railway Company, Citizens' Railway Company, Southwestern Railway Company, Southern Electric Railroad Company, St. Louis Railroad Company and Baden and St. Louis Railroad Company, respectively, connected, and the cars of said companies respectively, run on the track or tracks of others of said companies;

" 'Therefore, the St. Louis Railroad Company is hereby authorized to connect its tracks on Broadway with the tracks of the Citizens' Railway Company at Morgan street and Franklin avenue, and to connect its tracks on Broadway and Walnut streets with the

tracks of the Cass avenue and Fair Grounds Railway Company, and its tracks at Broadway and Elm street with the tracks at that point, and to connect its tracks at or near Broadway and Keokuk street with the tracks of the Southern Electric Railroad Company; and authority is given to the Southwestern Railway Company to connect its tracks with the Southern Electric Railroad Company at Chippewa street and Jefferson avenue; and thereupon with the consent of the St. Louis Railroad Company and said Citizens' Railway Company, Cass avenue and Fair Grounds Railway Company, Baden and St. Louis Railroad Company, Southern Electric Railroad Company and the Southwestern Railway Company, respectively, the cars of said companies respectively, may be run on each other of said companies' tracks respectively, and upon the tracks of any railway company with which any of the tracks of said companies may intersect, and may be agreed upon between them respectively, and with such companies whose tracks may be so intersected, and for that purpose authority is hereby given to make desirable curves and switches and connections therewith, and the cars shall be run at the same rate of speed on the tracks on which they may run as is now provided by ordinance for the running of cars thereon.'

"Section 3. For the better effecting the purpose of this ordinance, the said Cass avenue and Fair Grounds Railway Company, Citizens' Railway Company, Southwestern Railway Company, Southern Electric Railroad Company, St. Louis Railroad Company, Baden and St. Louis Railroad Company and any company whose tracks may be intersected by the tracks of any of said companies, and their successors and assigns, are hereby severally authorized to sell, convey, or lease, if found desirable, their property, rights, privileges and franchises now owned and held, or herein granted, respectively, to any of the said companies

named in this section, or to the St. Louis Transit Company, its successors and assigns, the said company and its successors and assigns so acquiring such property, rights, privileges and franchises, is hereby authorized to acquire, hold and enjoy the same during the term of this ordinance; provided, however, that if such acquisition is had, passengers shall be transported over the whole or any part of said railroads or railways, in the city of St. Louis, so acquired, on one continuous ride for one fare, and for that purpose transfers may be made at convenient points.'

"It was admitted on the trial that the United Railways Company (sometimes called herein the Railways Company) acquired by purchase all the railroad lines named in paragraph one of the ordinance, that two-thirds of the stockholders of the two corporations passed resolutions authorizing the lease, and that the contract of lease was duly executed.

"The contract recited that the United Railways Company and the St. Louis Transit Company were, at the date of the instrument, corporations, organized under the laws of the State of Missouri; that the former owned several lines of railway in the city and county of St. Louis, and certain bonds and stocks described in a deed to the St. Louis Transit Company of date September 30, 1899; that the United Railways Company was willing to lease its railway lines, property and franchises, and all the income from its bonds and stocks to the Transit Company for a period beginning October 1st, 1899, and ending April 1, 1939, and that the Transit Company was desirous of acquiring said lines and franchises by lease. The contract then proceeds to say: 'Now, therefore, this agreement witnesseth, That United Railways for and in consideration of the covenants and agreements hereinafter contained on the part of the Transit Company, to be by it made, kept and performed, has granted, demised and leased, and

by these presents does grant, demise and lease unto Transit Company all of the railways' etc. The subsequent portion of the instrument may be summarized as follows: The Transit Company acquired from October 1, 1899, to April 1, 1939:

"First. All the railroads constructed, owned or operated by the United Railways Company or that it might thereafter construct, own or operate.

"Second. All the property, real, personal or mixed, held by the United Railways as owner or otherwise or that it might acquire.

"Third. All the income derived from any bonds or stocks owned by the United Railways or which it might acquire.

"Fourth. All franchises belonging to the United Railways or which it might acquire, except the franchise to be a corporation and any other right or franchise necessary to preserve its corporate existence and organization.

"Fifth. Exclusive right to use, manage and operate the railways and fix and collect tolls, but not at higher rates than United Railways was empowered to fix them.

"Sixth. All money of the United Railways on hands at the date of the lease or received by it afterwards from any source. (Par. 9.)

"The Transit Company, as consideration, agrees:

"First. To pay a net annual rental of five dollars per share on all the preferred stock of the United Railways then outstanding or that might be issued with the consent of the Transit Company; said rental to be paid quarterly on the 10th days of January, April, July and October of each year.

"Second. At its own cost and expense and without deduction from the rent (a) to maintain, operate, work, use and run and keep in public use the demised railways in the same manner the lessor, the United Railways, was required to do; (b) keep the demised

railway and their property in good repair, working order and condition and supplied with rolling stock and equipment so as to develop the business; (c) make any repairs and replacements on the demised property, and all additions to and improvements thereon, and provide such new and additional rolling stock from time to time as might be necessary for the proper operation and use of the property.

"In payment for the additions, acquisitions, betterments and improvements made by the Transit Company to the property demised, the contract provided that the United Railways, when requested by the Transit Company or on its order, should deliver to the latter bonds of the first general mortgage bonds secured on the rented railway at par and authorized to be issued for improvements; or, in lieu of said bonds, any unissued preferred or common stock of the United Railways at the option of the Transit Company.

"Third. In addition to the regular rental, the Transit Company agreed to pay the United Railways Company \$1,000 a year for the purpose of defraying the expenses of maintaining the corporate existence of the United Railways and companies connected with it.

"Fourth. Pay all the floating debts of the United Railways Company.

"Fifth. Pay all tolls, assessments and water rents assessed against the property of all kinds of the United Railways Company.

"Sixth. Pay the interest on the bonds thereon issued by the United Railways and the subordinate companies whose lines had been acquired by the United Railways Company and included in the lease to the Transit Company. Seventeen issues of bonds aggregating about \$35,788,000 are enumerated under this item of the consideration paid by the Transit Company for the lease.

"Seventh. Keep the demised property insured at its own expense.

"Eighth. Apply all net surplus earnings above 6 per cent annual dividends on its capital stock, either to the extension and betterment of the leased lines of the railway, or the redemption of the mortgage indebtedness on the leased property.

"Ninth. To apply all money not needed for current liabilities or interest turned over to it by the United Railways, or on hand at the date of the lease, or received by the United Railways thereafter from the rent of useless property, to the improvement of the demised property.

"A. The Transit Company agreed to 'indemnify, save and keep harmless the United Railways during the continuance of the lease from all costs, charges and expenses arising from the management and operation of said Railways and all matters incident thereto.' (Par. 1 of lease.)

"B. The United Railways agreed in effect to maintain its corporate existence, and when requested by Transit Company, put in force and exercise each and every right it owned or might acquire, and do every lawful corporate act necessary or proper to enable the Transit Company to avail itself of the franchises and property demised; and the Transit Company agreed to indemnify the Railways Company 'against all expense, loss, damage or liability for such exercise of corporate power or performance of corporate acts.'

"C. The right of re-entry on the demised property was restored to the United Railways in the event the Transit Company failed to keep any of its covenants. It was provided that a re-entry for non-performance of covenants by the Transit Company should not prejudice the right of the United Railways to recover damages for the default.

"D. All cars, machinery, tools, appliances and other personal property belonging to United Railways

should be turned over to Transit Company as soon as the lease took effect, and, in case of the termination of the demise, should be restored to the Transit Company, or in lieu thereof its value paid; the value to be found by an appraisement.

"E. On termination of the contract for breach of covenant, all betterments previously made by the Transit Company became the property of the United Railways.

"F. The Transit Company agreed to keep true accounts of its receipts and disbursements, and that its books should be open to inspection by the United Railways.

"G. Differences arising between the two parties regarding the meaning of any part of the lease, and other matters, were to be settled by arbitration.

"That the United Railways Company is liable in damages to plaintiff notwithstanding the contract between it and the Transit Company, and the operation of the line and car on which she was hurt by the Transit Company, pursuant to the contract, is maintained on three grounds: first, that if the contract is a lease, it is inoperative for lack of consent to the leasing by the city of St. Louis; second, that the contract is not a lease, but in legal effect is an agreement by the Transit Company to operate the railway lines it was put in possession of for the United Railways Company as the latter's agent, or else is a partnership agreement between the two companies; third, that if a valid lease, the United Railways Company as lessor remained liable for all torts of the Transit Company as lessee, because the statute allowing such leases by street railway companies contains no clause expressly exempting a leasing company from liability for the acts of the lessee.

"The Constitution of the State forbids the enactment of a statute granting the right to construct and operate a street railway in any city without first ob-

taining the consent of the local authorities, and forbids too the transfer of a right or franchise to occupy a street with a street railroad without first obtaining such consent. [Const. art. 12, sec. 20.] The argument for the plaintiff is that the ordinance relied on as giving the consent of the city of St. Louis to the lease in question did not, in truth, give consent, because it only authorized the railway companies named in it to lease the lines of railway named, including the one on which plaintiff was hurt, and did not authorize a lease of the properties by the United Railways Company, which was not named. It will be seen that the third section of the city ordinance, which we have quoted, expressly authorized the lease of the line on which plaintiff was hurt to the St. Louis Transit Company by its original owners, one of the companies named, which one is not disclosed by the evidence. It is admitted that the United Railways Company acquired by purchase all the lines of railway owned and operated by all the railway companies mentioned in the ordinance. There is no sound reason for saying that the United Railways Company, though the owner of the line pursuant to a valid purchase, could not lease it to the Transit Company just as the original company might, pursuant to the permission given to the latter by the city. The city had authorized the Transit Company to acquire it by lease, and municipal interests could not be helped by permitting the original owner to grant the lease, and refusing to permit a lawful purchaser to do so, when the lessee, in either event, would be the same. The decisive fact bearing on this point is not, as plaintiff's counsel insists, that the United Railways Company received no authority to lease the line of railway on which plaintiff was hurt to the Transit Company. It is that the latter was authorized to take a lease of it. Hence the argument that the words of the ordinance purporting to empower the

street railway companies named and 'their successors and assigns,' to lease their several railway lines, did not operate and empower the United Railways Company as purchaser of said railway lines to lease them, is not relevant to the proposition that the lease is void for lack of the city's consent. The case of *Oregon Railroad Company v. Oregonian Railroad Company*, 130 U. S. 1, decides that the words 'successors and assigns,' as used in various State statutes in connection with specific grants of power to railway companies, did not necessarily import that the Legislature intended to empower railway companies to lease or sell the entire property. There was no Oregon statute undertaking in express terms to empower a railway company to assign or lease all its property; but an attempt was made to deduce a sweeping power of that kind from general statutes granting authority to do many things to railway companies 'their successors and assigns.' These statutes were said to show the Legislature intended that any power or franchise granted to a railway company in the general laws under which all railway companies must be incorporated in Oregon, might be exercised and enjoyed by an assignee or successor of the original company; that hence, the statutes, by implication, authorized a company to assign or lease its entire property. It is plain that this argument was far-fetched, and in conflict with the rule universally enforced, that a lease or assignment of all its franchises and assets by a corporation created for public purposes and charged with public duties, thereby disabling it to serve the public, is void unless authorized by statute. [Thomas v. Railroad, 101 U. S. 71; Railroad v. Railroad, 118 U. S. 290, 309; Beman v. Rufford, 1 Sim. (N. S.) 550; Railroad v. Railroad, 9 Hare 305; Winch v. Railroad, 5 DeG. & S. 562.] The proposition decided in *Oregon Railway Company v. Oregonian Ry. Company* gives no support to the proposition that the lease by the United

Railways Company to the Transit Company is void because not assented to by the city, for the city did assent; and in connection with its assent attended to the detail of selecting the lessees which might take, one of them being the Transit Company which did take. Were it necessary, other cogent reasons could be given against the position that the lease contract under examination is void because in conflict with the constitutional provision we have cited, but the foregoing are deemed sufficient.

“Is the agreement between the companies a lease or a contract for the operation of the United Railways Company’s lines by the Transit Company as the agent of the former company and for its benefit? Did it constitute a partnership? We will first deal with the legal effect of the instrument as ascertained from its terms, and not with a possible ulterior motive or purpose which may have prompted its execution. If the agreement was not entered into in good faith and for the purpose declared, but to defeat the creditors of the United Railways Company or enable its properties and franchises to be held and exercised for its benefit in a manner that would screen it from judgments and relieve it of responsibility, no doubt the United Railways Company would be held liable without regard to the contract. But such an issue would be for the jury unless the instrument itself, or facts in evidence, show the truth beyond dispute. No fact *aliunde* to cast suspicion on the transaction was shown; and if the agreement is to be ignored on the ground that it was not entered into in good faith the ground must be established by the contents of the instrument. This matter will be recurring to again. The question to be settled first is as to the legal nature of the agreement as written. It is apparent that the contract is more than an operating one; for it transferred to the Transit Company other property than the railways and their ap-

purtenances belonging to the United Railways Company and required the Transit Company to perform other acts besides operating the railway lines. The Transit Company acquired every franchise held by the United Railways Company except the franchise to be a corporation; all the latter company's property, real, personal and mixed; all the income derived from its bonds and stocks; the money it had on hand at the date of the agreement, and what it might receive afterwards by the sale of unusable property. Besides operating the railways, the Transit Company was bound to do various acts, such as keeping them in repair, making extensions and improvements and meeting the interest on bonded obligations. Therefore, it is obvious that if the agreement between the two companies was one for the operation of the railways, that term in the agreement, though perhaps the principal and most important one, was mingled with others of much importance. We can think of only three conditions on which the Transit Company could operate the United Railways Company's lines for the benefit of the latter. These are: first, operate them for absolutely no reward and as a mere gratuity to the United Railways Company; second, for compensation either in the form of a regular payment by the United Railways Company for the service or for a percentage of the earnings; third, on a partnership arrangement between the two companies. The agreement certainly did not contemplate that the Transit Company should operate the railways for nothing, nor was it allowed a fixed stipend or a percentage of the receipts in payment for its services. On the contrary, instead of being paid to operate the line, it agreed to pay the United Railways Company for the possession and use of the property during a stated period, the payments to be made at regular intervals and bearing all the characters of a fixed rent charge. The agreement did not provide that the Transit Com-

pany should conduct the business in the name of or for the benefit of the United Railways Company, except in so far as the latter company was benefited by the consideration to be rendered by the Transit Company. It would be a very forced construction for us to torture the agreement by which the Transit Company was to yield fixed sums at regular intervals for the use of the property, into a contract of agency which made the United Railways Company principal and the Transit Company agent. All the elements of such a relationship are absent.

“Neither did the contract make the two companies partners, either between themselves, or as to third parties. A division of the profits of a business is not alone sufficient to constitute a partnership. The essential test is whether the parties asserted to be in partnership intended to establish that relation. [McDonald v. Matney, 82 Mo. 358; Mackie v. Mott, 146 Mo. 230.] Manifestly the two defendant companies had no thought of becoming partners; and as they did not hold themselves out to the world as such, there is no ground for holding they were. Therefore, we find that neither the relation of principal and agent or of partnership can be applied with propriety to the contract.

“Does the contract possess the elements of a lease? In this connection it is proper to remark in the first place that goods, chattels and franchises may be leased as well as land and tenements. [1 Platt, Leases, p. 24; 1 Wood, L. & T. (2 Ed.), sec. 202; 1 McAdam, L. & T. (2 Ed.), p. 258; 1 Taylor, L. & T. (9 Ed.), secs. 17 and 18.] A statute of the State gave the United Railways Company the right to lease its franchises, railway lines and every other property, and by the same statute the Transit Company had the right to acquire every character of property, belonging to the United Railways Company, including its franchises. [R. S. 1899, sec. 1187.] We need not be troubled about

the power of the two companies to enter into a lease covering all the properties mentioned in the instrument. The contract in question divested the United Railways Company of the possession and use of the properties during the period named (40 years) in consideration of a specific rent to be paid by the Transit Company, and other duties, in the nature of rent, to be performed by the latter; provided, further, for the reversion of the property to the grantor, the United Railways Company, at the end of the term, and for a re-entry if the Transit Company defaulted in the performance of its covenants during the term. Those ingredients in the agreement suffice to constitute a lease. [1 McAdam, L. & T., sec. 47, p. 127.] The contract on its face shows that it was intended to be a lease, and contains the elements essential to constitute one. Therefore there is no reason for hesitating to pronounce it a lease in legal effect and only to be impeached by facts showing it was not executed in good faith. Documents of like tenor have been before courts for construction several times and they were treated as leases. [Mayor v. Railroad, 113 N. Y. 311; Miller v. Railroad, 125 N. Y. 118; Driscoll v. Railroad, 65 Conn. 230; Terre Haute Railroad v. Cox, 102 Fed. 825.] In fact, most of the cases relied on by the plaintiff accept such contracts as leases; though for different reasons the lessors were held responsible to third parties for torts of the lessees. We are cited to the case of St. Jos., etc., Railroad v. Iron Mountain Railroad, 135 Mo. 173, as construing a contract like the one under review to be an agreement by a nominal lessee to operate a railway for the benefit of a nominal lessor, and hence, in legal effect, not a lease but an operating agreement. But in that case the terms of the instrument construed were quite different from those of the instrument before us. The decision of the court that it was a mere operating contract, was rested prin-

cipally upon the fact of there being no stipulation for rent to be paid for the use of the property which was the subject-matter of the contract. In that case the Iron Mountain Railway Company, which was alleged to be a lessee of the lines of railway owned by the Wabash Railway Company, was obligated by the supposed lease to pay nothing in the way of rent except what might be earned by the operation of the roads. That is to say, the Iron Mountain Company simply took over the roads to operate and apply the earnings for the benefit of the Wabash Company. The Iron Mountain Company did not assume any individual liability of any kind in consideration of the supposed lease, nor bind itself or its assets for any rent. It was for this fact that the contract between the two companies was held not to be a lease, but an operating agreement. The opinion says:

“ ‘After a careful consideration of all its terms and stipulations, we are constrained to hold that it is not (i. e., a lease). Its use of the words ‘demise’ and ‘lease’ can not be held to be controlling. For want of a better definition it may be styled an operating contract, under the stipulations of which the Wabash retains all the substantial and beneficial interest in its several railroads and leased lines, and in which the Iron Mountain railroad, under the power of attorney therein granted, assumes to operate the Wabash system, collect the tolls and freights, and disburse them for the sole use and benefit of the Wabash, subject at all times to the supervision of the board of directors of the Wabash as to its management and the right to inspect its books and the accounts of the earnings and disbursements.

“ ‘It will be observed that the Iron Mountain nowhere in said contract binds itself to pay the Wabash a certain rent unconditionally out of its own moneys and revenues. It merely undertakes that out of the

earnings of the Wabash it will, so far as they will suffice, pay the fixed charges which the Wabash had already assumed, and if there is any surplus to pay this over as directed by the board of directors of the Wabash. Under no circumstances are the earnings of the Wabash system or any part thereof to become the property of the Iron Mountain. All idea of individual liability of the Iron Mountain over and beyond the earnings of the Wabash for any of the obligations assumed is carefully and studiously excluded. There is no right on the part of the Wabash to a certain profit issuing periodically out of its properties as rent reserved.

“ ‘Instead of passing to the Iron Mountain a definite determinate estate of which it should be the absolute owner, it seems to us that the true effect of the whole instrument was to leave the beneficial estate in the Wabash and to constitute the Iron Mountain its agent to manage and operate the road subject to the supervision of the Wabash and with the right of the Wabash to know at all times that the earnings and receipts were being disbursed for its use and benefit. While it was a perfectly valid contract, it is a misnomer to call it a lease or a sublease. [State ex rel. v. Schweickardt, 109 Mo. 496; Anglade v. St. Avit, 67 Mo. 434.]

“ ‘To transform this carefully guarded undertaking merely to operate the road for the Wabash and account to it for all the earnings and disburse them for its sole use, into the unconditional and absolute liability assumed by the Wabash in the lease from plaintiff to it, would certainly be subversive of the clear intention of the Wabash and the Iron Mountain, and, as already said, this ought never to be done unless the established rules of law will permit no other alternative.’

“By the contract before us the Transit Company’s liability for rent was not confined to the earnings of the leased property. The Transit Company was a corporation with a capital stock running into the millions, and its property was all subject to the obligation of its contract with the United Railways Company to pay the various charges and items of rent enumerated in the lease.

“But it is insisted that paragraph 9 of the lease bound the United Railways Company to turn over to the Transit Company any money received by the former from any source and, therefore, whatever rent the Transit Company paid would be repaid to it; thus showing there was no real consideration for the lease. One item of rent is to be used to maintain the corporate existence of the United Railways Company. Another item to be paid quarterly is in the nature of a dividend on the preferred stock of the Railways Company. We hardly think the ninth paragraph intends that those cash items of rent, which are to be paid to the Railways Company, must be returned by it to the Transit Company; but that the fair interpretation of the lease, taking into consideration all its terms with reference to this point, is that it aimed to transfer all the lessor’s assets of every kind for an agreed rental. The Transit Company became entitled to all the assets of the Railways Company, including cash on hand, or that might come to it from the sale of property or other sources except the rent, which was the consideration to be paid for the transfer to and use by the lessee of the assets. The purpose of paragraph 9 seems to be to bind the Transit Company to use the cash received from the Railways Company in keeping the leased property in good repair. However, we are not called on to construe the ninth paragraph as to this question; because no one will contend that its language bound the Railways Company to reimburse the Transit Company

for money paid by the latter as rent, not to the Railways Company, but to third persons on the obligations of the Railways Company. Now, the Transit Company, as lessee, agreed to pay all the floating debts of the Railways Company (par. 4), all its taxes, assessments and water rents (par. 5), the interest on the various issues of bonds secured on the different lines of railway (par. 6), and the insurance premiums on the property (par. 7). These chief items of the rent, running annually no doubt into many thousands of dollars, the lessee was bound to pay to third parties and not to the lessor, and there is nothing in paragraph nine, or any other part of the lease, which bound the lessor to reimburse the lessee for the amounts thus paid. And, as said, the Transit Company was bound to pay these and the other items of rent even though the operation of the railways failed to earn enough money to meet the obligations. This contract is, therefore, radically different from the one construed in *St. Jos. Railroad v. Iron Mt. Railroad*, *supra*, and presents the essential elements of a lease.

“The proposition next to be considered is, conceding that the contract was a lease, did the United Railways Company nevertheless remain responsible for injuries to a passenger resulting from the negligence of the Transit Company? In other words, is a leasing railway company so far liable for the torts of the lessee that it must answer in damages for a tortious injury to the passenger? This question is one on which there is a great diversity of judicial opinion; but it is proper to state as a circumstance bearing on the weight of authority, that in most of the cases affirming the liability of the lessor, there were dissents. I think the preponderance of authority, and the great preponderance of reason are against the liability of the lessor in such cases. I think, too, that as a rule of law the doctrine that the lessor is liable is at war with the general rules

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and principles governing the liability of lessors for the acts of their lessees and the settled canons of statutory construction. As the statutes of this State give a street railway company power to lease all of its property to another street railway company, there was direct statutory authority for the lease in dispute; and only those adjudications are exact precedents wherein statutory authority for the controverted lease existed. The particular statute authorizing such leases appears in the Revised Statutes of 1899 as a new section, 1187. It is said not to have gone into force until November 1, 1899, and too late to confer authority for the contract we are dealing with, which was dated September 30, 1899, and took effect on October 1, or the next day. But the statute was enacted with an emergency clause and approved June 19, 1899, prior to the contract in question. It is further said that the enactment only conferred the power to lease on corporations formed under the act and that both the United Railways Company and the Transit Company were incorporated under prior statutes. But by section 15 of the act, any street railroad company theretofore organized under any general or special law of the State was granted all the powers, benefits and privileges of the act if it would file in the office of the Secretary of State a resolution of its board of directors accepting the provisions of the act and paying into the State Treasury the fees required by section 13. The present record does not show whether or not the United Railways Company or the Transit Company complied with section 15; but in considering this point it is to be remembered that the United Railways Company did not introduce in evidence the contract with the Transit Company as matter of defense, and hence was not bound to show affirmatively it had power to execute the contract, as would have been incumbent on it had it sought to evade liability by proving the lease. The instrument was in-

troduced by the plaintiff to fasten liability on the United Railways Company, and there was no contention that the said company was without power to execute it because of failure to take advantage of the act of July 19, 1899, in the manner provided in section 13. The plaintiff relied on an instrument which she contended the United Railways Company had executed, to prove said company was liable to her on several grounds; none of which was lack of statutory power to make a lease. Hence, it ought to be presumed, in the absence of proof to the contrary, that the two companies which were parties to the alleged lease, or at least the United Railways Company, had complied with the requirement of the statute authorizing street railway leases and had become entitled to the benefits and powers conferred on complying companies.

“Cases affirming the liability of a leasing railway company for torts of the lessee should be classified with reference to the existence of such a statute when the lease was executed. All courts agree that, in the absence of a statute, a lease of its property and franchises by a railway company does not relieve it of its public duties and responsibilities, and that the lessor remains liable for the torts of the lessee. In other words, there is no common law authority for such leasing by railroad companies; at least, in so far as the contract impairs the right of the public to hold the lessor answerable for the proper discharge of the duties it assumed in consideration of the powers granted to it by the sovereignty. [Railroad v. Brown, 17 Wall. 445; Thomas v. Railroad, 101 U. S. 71; Chollette v. Railroad, 26 Neb. 159, 4 L. R. A. 135; Muntz v. Railroad, 64 L. R. A. 222.]

“Before going into a discussion of the question on principle, it is well to classify the adjudications, so that those directly in point may be studied more readily, and those wherein the proposition affirmed is not iden-

tical with the one involved here, may have attached to them the value they merit as containing the lucubrations of judges on the general question, and not treated as precedents on the exact question before us. When the lease is authorized by statute, the leasing company, of course, remains liable for the acts of the lessee if the statute says it shall. [Smith v. Railroad, 61 Mo. 17; Markey v. Railroad, 185 Mo. 348; Main v. Railroad, 18 Mo. App. 388; Brown v. Railroad, 27 Mo. App. 396; McCoy v. Railroad, 36 Mo. App. 445; Qusted v. Railroad, 127 Mass. 204; Daniels v. Hart, 118 Mass. 543; Bower v. Railroad, 42 Ia. 546; Whitney v. Railroad, 44 Maine 362; Stearns v. Railroad, 46 Maine 95.] When the statute authorizes the leasing, but says nothing as to whether the lessor shall remain liable, a few courts hold that nevertheless the lessor is liable as fully as the lessee itself would be for the latter's tortious acts; and, in pursuance of this extreme view, these courts have held the leasing company liable for negligent injuries inflicted by the lessee on its own servants. [Railroad v. Hart, 209 Ill. 414; Logan v. Railroad, 116 N. C. 940; Harden v. Railroad, 129 N. C. 354; Singleton v. Railroad, 70 Ga. 464; Bank v. Railroad, 25 S. C. 216; Hart v. Railroad, 33 S. C. 427.] In the case last cited the court went so far as to hold the lessor liable in punitive damages for the wrongful conduct of the lessee. The doctrine of other tribunals is that the leasing company remains liable to third persons for an injury received because of the improper construction or bad repair of the roadbed, station houses, or other real property, on the ground that it was the peremptory duty of the lessor to maintain its properties in good condition for the use of the general public, including as part of the public the servants of the leasing company. [Lee v. Railroad, 116 Cal. 97, 58 Am. St. Rep. 140.] In certain cases which maintain the doctrine that the lessor is not exonerated by a statutory lease from responsi-

bility for the wrong performance by the lessee of any charter power or duty, it is held that the safe operation of cars and trains on which passengers are carried is a charter duty. [Railroad v. Culberson, 72 Tex. 375.] We have found no Missouri statute, either relating to the chartering of companies, or to their regulation, which undertakes to impose on street car companies by special legislative enactment the duty of careful operation of cars for the security of passengers, though such companies are under a common law duty of that sort. There are cases wherein the general principle that the leasing company remains responsible for the proper performance of its charter duties is adhered to, but the operation of trains and cars is declared not to be one of those duties. [Mahoney v. Railroad, 63 Maine 68.] And see note to Railroad v. Dunbar, 71 Am. Dec. 291, wherein, on page 297, it is said that a case holding the contrary does not accord with sound principle or authority. Other decisions repudiate these various distinctions as of no importance and ground the non-liability of the lessor on the grant of statutory power to make a lease; holding that this imports a lease with all the usual incidents and consequences of that sort of a contract, one of which is that if the property is in safe and good condition when turned over to the lessee, the lessor is not responsible for subsequent injuries arising from its bad repair. [Fisher v. Railroad, 34 Hun 433; Miller v. Railroad, 125 N. Y. 118.]

“The foregoing cases may be classified, too, with reference to the principles on which they hold the leasing company responsible. Some courts profess to do this because public policy requires it, but disagree as to what particular public policy is to be subserved by the rule. Some ground the responsibility, as we have seen, on the fact that a railway company is an artificial person, deriving its powers from the sovereignty, and

in consideration of those powers agreeing to perform certain duties for the sovereignty; hence should be held strictly accountable for their proper performance. Other cases declare that charter duties cannot be transferred, and that it is a charter duty to carry passengers safely. Others, that neither charter nor common law duties can be transferred to a lessee so as to shift responsibility from the lessor; and that if the safe carriage of passengers is not a charter duty of the leasing company, it is at least a common law duty for the due performance of which the company that owns the railway is answerable.

“Much stress is laid in some decisions on the supposed fact that if one railway company is permitted to lease its property to another, and thereby relieve itself from liability for the lessee’s torts, leases may be made to irresponsible companies and the public left remediless. [Harden v. Railroad, 129 N. C. 354.] There is one case—perhaps there may be others—which held the lessor responsible, apparently, on the ground that the lease did not transfer every franchise possessed by the lessor. [Braslin v. Railroad, 145 Mass. 64.] Still other cases hold the lessor responsible because, by the terms of the lease, it retains control of the management and operation of the leased property. [Driscoll v. Railroad, 65 Conn. 230.]

“It will be seen from the foregoing analysis that there is a wide divergence of opinion among courts holding the leasing railway company liable for the misfeasance of the lessee, both as to the extent of the liability (i. e., what instances of tortious conduct it covers) and the principles on which it is founded. A more direct reference to some of the cases may aid in elucidating the doctrines held and the sources whence they are derived. The Illinois cases run back to Railroad v. Dunbar, 20 Ill. 623, in which a leasing railway company was held answerable for breach of a contract by

the lessee to carry freight. The point came up on demurrer to a plea of the lease by way of defense. No statute authorizing such a lease was in force at the time and the contract was held to be *ultra vires*. In later cases, after such a lease had been authorized by statute, the Supreme Court of Illinois founded the liability of the lessor at first on the theory that the lessee was its agent for the operation of the railway. [West v. Railroad, 63 Ill. 545.] Afterwards, this theory was discarded as unsound, and the notion adopted that public policy forbade the leasing, because an insolvent lessee could be selected and all responsibility to the public evaded by the company to whom the State had granted franchises. [Railroad v. Hart, 209 Ill. 414.] The North Carolina cases are traceable to Aycock v. Railroad, 89 N. C. 321, wherein a company which had permitted another company to run trains over its track, was made to pay for damage done by fire communicated to adjacent farms, from rubbish permitted to accumulate on the right of way and ignited by sparks from an engine having no sparkarrester. There was no lease and it did not appear that the defendant was not actually operating trains on its road. [See dissenting opinion in Harden v. Railroad, 129 N. C. 354.] The Massachusetts case of Braslin v. Railroad, *supra*, lays stress on the facts that only a portion of the railroad of the lessor company was leased; that said company was not going out of business and that indemnity was taken by it for the acts of the lessee, thereby showing that both parties understood defendant was not to be released by the contract from the discharge of its public duties. The Georgia cases begin with Singleton v. Railroad, 70 Ga. 464, in which the defendant permitted its lessee to do business in its name, and in its name sell plaintiff the ticket on which he was traveling when hurt by the negligence of the lessee. It is apparent that though this was a case of leasing, the defendant

lessor was responsible, because it had permitted the lessee to hold defendant out as the principal in making contracts with the public and particularly with the plaintiff. In the Kentucky case of McCabe's Admr. v. Railroad, 112 Ky. 861, we gather from the opinion that the Constitution of the State retained the liability to the public of the original company in the event of a lease or other transfer of its properties. In Muntz v. Railroad, 64 L. R. A. 222, the opinion leaves one in doubt as to whether the lessor was held responsible because there was no legislative authority for the lease or because all the franchises and property of the leasing company were not transferred, or from motives of public policy. In the Driscoll case (65 Conn. 230), the lessee agreed to indemnify the lessor, not only against costs, charges and expenses in the management of the leased property, as was done in the case at bar, but also against damages incurred in the operation of the property; and, moreover, it was agreed that the superintendent of the lessee, who was given power to hire employees, must be satisfactory to the lessor. Two judges dissented in that case. The majority opinion said the sole question was whether or not the defendant (lessor) had transferred the property to the lessee. In Lee v. Railroad, 116 Cal. 97, a brakeman was hurt because of bad rails and roadbed. The Constitution of the State contained a clause inhibiting the release of the property of a lessor from liability for damage incurred in the construction and operation of the road; but the case was decided against the defendant on the ground that, in the absence of an express statutory exemption, it remained liable, notwithstanding the lease, for the proper construction of the road, station houses, etc. The opinion approves the doctrine of Railroad v. Curl, 28 Kan. 622, which holds a leasing company liable for the omission of a duty in the construction of the road, but exonerates it from responsibility for torts in

the handling of trains and the management of the road. The Kansas opinion was prepared by Justice BREWER, now of the Supreme Court of the United States, and indorsed the New York decisions concerning the liability of lessors for injuries due to defects in leased property, citing *Swords v. Edgar*, 59 N. Y. 28, and *Ditchett v. Railroad*, 67 N. Y. 425. In *Railroad v. Morris*, 68 Tex. 49, there was no statutory authority for the lease. The South Carolina cases most strongly support the plaintiff's position, whereas the Massachusetts cases can hardly be said to lend it any support. Opinions holding the lessor liable for the torts of the lessee, when the leasing is authorized by statute, leave the impression that the courts lay hold of various general rules of corporation law, having very remote bearing on the immediate question, in order to enforce what the deciding tribunal happens to think would be a salutary rule. Much stress is laid on the fact that the corporation is an artificial, instead of a natural, person, and derives its powers from the State. How this dogma can restrict the right of a railway company to lease its property, when the statute gives the right in unqualified terms, is not easy to perceive. The proposition that a railway company is bound to perform all its charter duties, and all its primary duties to the public, whether imposed by the charter or the common law, is sound. But the proposition that the Legislature may authorize it to transfer to any other company by lease the performance of those duties is equally sound. The mischief which it is supposed would result if leasing railway companies are not held responsible for torts, in that leases to irresponsible companies would be made for the purpose of evading liabilities, is met by two answers: first, if that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible; second, our statutes require one-half of the

capital stock of a street railway company to be subscribed and ten per cent of the subscriptions to be paid up in cash; and to that extent, at least, a lessee company would have to start with assets. [R. S. 1899, sec. 1186.] In the case at bar, the capital stock of the Transit Company was \$20,000,000, and it must have had \$1,000,000 of paid-up capital when organized.

“The policy of the State in regard to such contracts was settled by the Legislature when it authorized the leasing of the property of one street railway company to another. The policy is, of course, to permit such leases; for the very highest evidence of the public policy of any State is its statutory law. But it is said that the true public purpose is to permit the lease, but hold the leasing company answerable for the torts of the lessee. Inasmuch as there is legislation on the subject, the policy of the State must, as said, be derived from the enacted laws. If it appears on a fair interpretation of the statutes authorizing the leasing that the Legislature contemplated a continuance of the liability of the lessor, the law should be so declared; but if it appears that the Legislature did not construe this liability against the leasing company, but authorized leases of street railway properties with all the legal effects pertaining to lease contracts at common law, then the courts have no right to partially annul the legislative intention, or engraft on the law an exception in the interest of what they believe would be good policy. This whole question is not one of public policy at all, but of legislative intention—of statutory construction. The public policy notion misconceives and misses the essential inquiry. We have a statute broadly authorizing contracts like the one before us, and the primary inquiry is whether or not the statute discloses an intention on the part of the Legislature to hold a leasing railway company responsible for torts after the lease is executed and the property transferred.

The first rule for the interpretation of statutes is that their meaning must be collected, if possible, from the language used. Of course, if a certain interpretation would lead to absurd or iniquitous results, it will not be adopted unless compelled by the language. [Bowers v. Smith, 111 Mo. 45; Fosburgh v. Rogers, 114 Mo. 122; Lamar Co. v. Lamar, 128 Mo. 188.] We may allow, therefore, that the court may take into consideration what it believes would be for the common weal to this extent, namely, that, if one construction would be mischievous and another beneficial, and the language of the enactment permits either to be adopted, the salutary one will be preferred. The statute with which we are dealing, after enumerating other powers of street railway companies organized under the law, provides:

“Seventh. To purchase, lease, or acquire by other lawful contract, which shall include the right to purchase the capital stock and bonds of other street railroad companies, and to hold and dispose of the same, and to hold, use and operate any street railroad or roads, with all and singular its or their franchises and properties of every description belonging to any other street railroad corporation or corporations: Provided, that such purchase, lease or other contract be authorized or approved by the vote of the holders of two-thirds in amount of the capital stock of the company so purchasing, leasing or otherwise contracting therefor at a meeting called for that purpose upon twenty days' notice published in some newspaper of the city or county where the general office of such street railroad company may be located, or by written notice mailed to the last known address of each registered stockholder twenty days before such meeting; and provided further, such roads connect with or intersect each other, so as to allow a single passage one way over each road for a single fare.

“‘Eighth. To sell, lease or dispose of by any other lawful contract, to any other street railroad company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character and description: Provided, that such sale, lease or other contract disposing of its railroad, franchises and other properties, shall be first authorized or approved by the vote of two-thirds in amount of the holders of its capital stock at a regular or called meeting of its stockholders convened pursuant to such notice as is required in the next preceding clause.’ [R. S. 1899, sec. 1187.]

“It will be seen that the statute authorizes any railway company to purchase, lease or acquire by other lawful contract, all the franchises and property of every description belonging to any other street railway corporation, including the stock and bonds of the latter, and further authorizes the purchasing or leasing company to hold, use and operate the railway leased. The statute further authorizes any street railway company to sell, lease or dispose of by any other lawful contract, to another company, its railroad rights and franchises, including the right to be a corporation, and all and singular its other properties of every description. We remark emphatically, that as the Legislature granted street railway companies power to dispose of their franchise to be a corporation, it could never have been the intention to hold such companies responsible for the acts of a company acquiring the franchises. When a company disposes of its right to be a corporation, it practically passes out of existence, and cannot be held responsible in any legal method which occurs to us. Moreover, a company is authorized by said lease or other lawful contract, to dispose of all its property, which shows that the lawmaking body did not expect it to still stand responsible for the acts of the vendee; for how could it be held responsible after all its prop-

erty was gone? But it is argued that those provisions take effect only in the case of sales. The words of the statute are "to sell, lease or dispose of by any other lawful contract." Take the instance of a lease for a long term of years, covering all the leasing company's property of every kind and character; in what way would it be practicable to collect judgments from such a company? It is true the reversion of the property might be sold under execution, but that would be of very little value to the purchaser if it was under an unexpired term longer than an ordinary lifetime. To our minds, it is palpable from the statute itself that the Legislature never thought of holding the leasing company answerable for the torts of the lessee. It fully intended to make the latter responsible; at least for all torts occurring in the operation of the road. Moreover, it is repugnant to every principle of law or justice to hold one person or company responsible for the negligence of another which it had no power to prevent. The statute empowers the lessee company to operate the road and unless the power of control is reserved by the lessor in the lease the operation will be without any interference by the lessor. Could the Legislature expect that in that contingency the lessor should stand answerable for negligent torts? To so hold would largely annihilate the privileges granted by the statute—would frustrate the purpose of the law-making body. That the lessee company is not responsible is a view strongly enforced by our statute in regard to the construction of laws; the first clause of which declares that "when technical words and phrases, having a peculiar and appropriate meaning in law are used in a statute, they shall be understood according to their technical import, unless that meaning is plainly repugnant to the intent of the Legislature, or of the context of the same statute." [R. S. 1899, sec. 4160.] Now, the word "lease" has a settled technical

import. It imports a contract by which one person, either natural or artificial, divests himself or itself of, and another person takes possession of, lands or chattels for a term. Certain immunities and responsibilities attach to every lease by the well-settled rules of law, unless there are covenants to the contrary. One of these incidents is that if the demised property is turned over to the lessee in good condition, the lessor is not afterwards liable for damages resulting from the negligent use of the property by the lessee. [Ward v. Fagin, 101 Mo. 669; Gordon v. Peltzer, 56 Mo. App. 599; Mancuso v. Kansas City, 74 Mo. App. 138.] According to the mandate of the statutes for the construction of laws, the word "lease" in the street railway statutes must receive its ordinary legal meaning, for there is nothing in the context repugnant to that meaning; but, on the other hand, all the contextual language points to the conclusion that the Legislature used the word in its usual sense. Hence, we hold that, in authorizing a street railway company to lease its property and authorizing the lessee to operate the property thus leased, the Legislature intended that the lessee should be answerable for the manner in which it used the property, and the lessor should not be.

"Furthermore, it happens that there have been other statutes enacted in this State authorizing a railway company to lease its property, in which the Legislature expressly provided for the retention of liability on the part of the lessor for the proper performance of the duties it owed the public. [McCoy v. Railroad, 36 Mo. App. 445.] The same court which decided the McCoy case stated, in Brown v. Railroad, 27 Mo. App. 394, 400, that railway companies cannot, "by a lease without the consent of the State, escape responsibility for the acts of the lessee . . . but with such consent it may undoubtedly do so," citing various cases, including Mahoney v. Railroad, 63 Me. 68. The opin-

ion then calls attention to the fact that, by section 790 of the Revised Statutes of 1879 (sec. 1060, R. S. 1899), it is provided that any railroad company in this State leasing its road to a corporation of another State, should remain liable just as if it operated the road itself. [See, too, *Main v. Railroad*, 18 Mo. App. 388.] In *Markey v. Railroad*, 185 Mo. 348, the liability of the leasing company was expressly reserved by the statutes, and hence the case is not in point as an authority on the question before us. But from it and other cases, and from the statutes themselves, we learn that the Legislature of this State has not omitted from enactments authorizing railway leases, clauses reserving liability against a leasing railway company for the torts of the lessee, when the purpose was to continue the responsibility of the former. Hence it is fair to presume that, when no reservation of liability was made in the act, either by express words or by implication, the intention was that the lessee alone should be answerable for its torts.

“That this interpretation of the statute is a sound one, is maintained by practically all the elementary treatises, and, in our judgment, by the weight of judicial opinion. The following cases are directly in point: *Arrowsmith v. Railroad*, 57 Fed. 165; *Heron v. Railroad*, 68 Minn. 542; *Hayes v. Railroad*, 74 Fed. 279; *Caruthers v. Railroad*, 44 L. R. A. 737; *Mahoney v. Railroad*, 63 Maine 69; *Railroad v. Curl*, 28 Kan. 622; *Scziwak v. Railroad*, 4 Pa. Dist. Ct. 339; *Lakin v. Railroad*, 13 Oregon 436; *Gwathney v. Railroad*, 12 Oh. St. 92; *Railroad v. Mangum*, 68 Tex. 342; *Fisher v. Railroad*, 34 Hun 433; *Ditchett v. Railroad*, 67 N. Y. 425; *Mayor v. Railroad*, 113 N. Y. 311; *Miller v. Railroad*, 125 N. Y. 118. The reasoning of these cases is, in the main, that when the Legislature by statute confers the authority on a railroad company to lease its properties and on another company to take and oper-

ate them, and pursuant to such statute, a lease is made turning over all property in an unrestricted way to the lessee, the proper view is that the Legislature intended that all the ordinary incidents of a lease should accompany the transaction and the lessor not remain liable for operating torts. In *Pinkerton v. Railroad*, 44 Atl. 284, the court said:

“ ‘The last point made by appellant is that, even if the Pennsylvania Traction Company was incorporated, the lease to it by the Columbia & Donegal Railway did not exonerate the latter from liability. But such a proposition is contrary to all the established rules of law in regard to lessor and lessee. The latter steps into the place of the former, is substituted for him, and assumes all subsequent liabilities incurred in the operation of the property leased. That is the very ground on which it is held that a corporation cannot lease or transfer any part of its franchises without express legislative or charter authority. [*Nelson v. Railroad*, 26 Vt. 721.] If a lease did not exonerate the lessor, but left his liability unaffected, and only added the liability of the lessee, no one could possibly be hurt by it, or have any standing to complain. It is conceded that a franchise is a duty imposed, as well as a privilege granted, by the State, and the duty cannot be avoided or transferred to another without the State’s authority. But when such authority is shown, as in the act of 1887, to motor-power companies to assume by lease the operation of passenger railway companies, it must be construed as a grant, with all the ordinary attributes of such authority between lessor and lessee, unless the statute or the contract makes a reservation of continuing liability in the lessor. Neither is alleged in the present case. Neither *Van Steuben v. Railroad*, 178 Pa. St. 367, 35 Atl. 992, nor *Hanlon v. Turnpike Co.*, 182 Pa. St. 115, 37 Atl. 943, have any bearing on the present question. In the for-

mer the lessee was a New Jersey company, and it was held that the statute authorizing railroads to lease their lines did not extend to a foreign corporation, and in the latter it was said that there was no evidence of authority to make the lease. The remarks on this subject must, therefore, be taken as applied to the state of facts then before the court. In other States there is some conflict in the cases, and there is some difference of opinion among the text-writers as to the weight of authority. But, as is well said in 5 Thompson on Corp., sec. 5884 *n*, after stating the admitted rule that, if the lease is not valid, there is a continuing liability of the lessor: "Some of the courts state the doctrine loosely, without any apparent regard to the question whether the lease was lawful or unlawful. . . . But, by running back through the decisions of these courts on the subject, it will generally be found that in the first case stating the doctrine stress was laid on the fact that the Legislature had not authorized the railroad company to assign its franchises, or devolve its public duties upon another person or corporation." This points out clearly the source of most of the conflict in the cases. Two of them are specially relied on by appellant, and were cited in *Hanlon v. Turnpike Co.*, supra; *Nelson v. Railroad*, 26 Vt. 717, and *Railroad v. Brown*, 84 U. S. 445. In the former it nowhere appears that the lease was authorized by law, and in the latter the railroad was operated jointly by the lessee and the receiver of the lessor, and the passage ticket which was the basis of the action was issued in the name of the lessor company. On the general subject, see Booth on St. Ry. Law, sec. 425; Pierce on Railroads, 283; Patt., Ry. Acc. Law, secs. 130, 131; 19 Am. and Eng. Ency. Law, 891, note. After consideration of both views, we are of opinion that the settled principles of law and the decided weight of authority are in favor

of the rule that, where a lease is duly authorized by law, there is no further liability of the lessor for negligence of the lessee in the operation of the road.'

"In the *Heron* case, 68 Minn. 542, it is said that in enacting a statute authorizing the lease without retaining the liability of the lessor, the Legislature impliedly relieved it from liability. The same doctrine is maintained in the *Caruthers* case, decided by the Supreme Court of Kansas, and in most of the other cases cited above. The New York courts hold that an unrestricted lease of a railway, made pursuant to a statute which confers on the lessee the right to take and operate the property, stands like any other case of leasing, and that if the lessor turns the property over to the lessee without any reservation of control, the latter alone is responsible for the negligent use of it. In the following text-books, the doctrine that the lessor ceases to be responsible, is maintained: 2 Elliott, *Railroads*, sec. 469; Hutchinson, *Carriers* (2 Ed.), sec. 515; Pierce, *Railroad Acc. Law*, secs. 130, 131; Booth, *St. Ry. Law*, sec. 425; 5 Thompson, *Corporations*, sec. 588; Nellis, *Surface Railroads*, p. 266, sec. 16; Nellis, *St. Ry. Acc. Law*, p. 488, sec. 6; Noyes, *Intercorporate Relations*, sec. 219, particularly page 316. See, also, comments made by Judge REDFIELD in his work on *Railways* on the decision of *Nelson v. Railroad*, 26 Vt. 721. In commenting, he says that the effect of legislative consent to the lease was not met or decided in the *Nelson* case. [Redfield, *Railways*, p. 618, note.]

"Of course, those commentators recognize the division of judicial authority on the question; but every one of them gives his voice in favor of the soundness, on principle, of the proposition that the leasing company is not responsible for damage entailed by the negligence of the lessee in the operation of the road when the leasing is done under statutory authority. Plaintiff's injury was not caused by a bad roadbed, or by

anything but the carelessness of the crew of the car on which she was riding; that is, the carelessness of the Transit Company's employees, whom the United Railways Company had not the least opportunity to control. Therefore, for the foregoing reasons, we think the judgment in favor of the United Railways Company, on the present record, was for the right party and should be affirmed.

"Of course, if evidence was adduced to show that it was contemplated from the first by the incorporation of the two companies that the property should be leased to the Transit Company in order to accomplish a fraudulent purpose, and that the alleged lease was a sham; or any other fact was proved to show it was not made in good faith, but to protect the United Railways Company from debts and judgments, a very different proposition would be presented for decision. The essential fact to be shown to overthrow the lease is that it was not bona fide, but colorable—was a fraudulent conveyance. This, however, is purely a question of fact to be established by relevant evidence in the bill of exceptions touching such issue. The proposition squarely asserted is that the United Railways Company is responsible, as a matter of law, for the injuries of the plaintiff, even if its contract with the Transit Company was a lease in legal effect and executed with an honest purpose. We do not assent to that proposition, but think the liability of the Railways Company depends on facts *in pais*, and cannot be established by construing the writing purporting to be a lease."

In our judgment there is no conflict between the opinion of Goode, J., *supra*, and the opinion of this court in the cause of Markey v. Railroad, 185 Mo. 348. The Markey case was grounded upon the statute of this State, which authorized domestic railway companies to lease their roads to foreign railway companies.

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but which statute expressly provides that the lessor should remain liable. Such is not the case at bar, and such is not the statute under review. The Markey case, *supra*, in no way conflicts with the views of the law expressed by Goode, J., *supra*.

We therefore affirm the judgment of the circuit court. All concur.

THE STATE ex rel. KOCHTITZKY et al. v.
RILEY et al.

In Banc, March 30, 1907.

1. **CIVIL SUIT.** The phrases "civil case" and "civil suit" refer to the legal means or proceedings by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words "criminal cases," which refer to public wrongs and their punishment.
2. ———: **Change of Venue: Drainage District.** Under the provisions of section 818, Revised Statutes of 1899, providing that "a change of venue may be awarded in any civil suit," land-owners, upon a compliance with the statutory requirements, are entitled to a change of venue in a proceeding brought in the circuit court for the formation and incorporation of a drainage district for the reclamation of swamp and overflowed lands. Such a proceeding is a "civil suit" within the meaning of those words.

3. **PROHIBITION: Change of Venue: Error.** If the application for a change of venue is not in conformity to the statutory requirements, or if the proper notice that an application for a change would be made was not given, then error in granting the change of venue may be corrected by an appeal. The court having jurisdiction to grant the change of venue, the Supreme Court will not by writ of prohibition prohibit it from exercising that jurisdiction, however erroneous its action may be. It is not the purpose of the writ of prohibition to correct errors of the trial court.

Prohibition.

WRIT DENIED.

Oliver & Oliver for relators.

(1) The writ of prohibition is of common law origin and is of great antiquity. It was framed to confine courts of special, limited, or inferior jurisdiction within the proper limits of their authority, and to prevent confusion in the administration of justice. 16 Enc. Pl. and Pr., 1093; 2 Bailey on Jurisdiction, sec. 449; *Smith v. Whitney*, 116 U. S. 167. (2) It issues to an inferior court, when such court exceeds its jurisdiction in a case of which it may take cognizance, no less than when it has no jurisdiction whatever. And it is available to keep a court within the limits of its lawful authority in a particular proceeding, as it is to prevent the exercise of jurisdiction over a cause not given by law to it for consideration. *State v. Slover*, 126 Mo. 652; *State v. Withrow*, 133 Mo. 500; 2 Bailey on Jurisdiction, sec. 447; *Railroad v. Wear*, 135 Mo. 230. (3) If a court attempts to exercise jurisdiction in a case, or in a manner not authorized by law, it is the duty of the Supreme Court, under its supervisory jurisdiction over all inferior courts, to prohibit it. Const., art. 6, sec. 3; *Railroad v. Wear*, supra; *State ex rel. v. Spencer*, 166 Mo. 271. (4) The writ is not confined to cases where the lower court has no juris-

diction at all, but extends to cases where the court having jurisdiction of the suit exceeds its legitimate or lawful powers. *State v. Slover*, 126 Mo. 652; *State v. Withrow*, 133 Mo. 500; *State v. Ellis*, 130 Mo. 90. (5) The right to a change of venue is purely statutory and has no existence outside of the special grant of power to award it; and to entitle a party to a change of venue, he must comply with all the substantial requirements of the enabling act. *State v. Headricks*, 149 Mo. 403; *State v. Wofford*, 119 Mo. 409; *State v. Sanders*, 106 Mo. 194; *State v. Woodson*, 86 Mo. App. 253; *Cole v. Cole*, 89 Mo. App. 233; *Smith v. Railroad*, 31 Mo. App. 140. (6) An application which fails to show when the applicant received his information as to the bias or prejudice of the trial judge is insufficient and will be refused. *Smith v. Railroad*, 31 Mo. App. 140; *Ranney v. Railroad*, 157 Mo. 477; *Railroad v. Holliday*, 137 Mo. 440. (7) The statute under which these drainage proceedings are had makes no provision for a change of venue. And the right to a change of venue, as above stated, is purely statutory and does not exist except in those instances where the statute gives it. (a) It has been held that a statute authorizing the removal of a suit, action, issue, petition, presentment or indictment by the judge or judges of any court of the State does not authorize the removal of an equity suit by a change of venue. *Cook v. Cook*, 41 Md. 362. (b) So a change of venue was denied on a *quo warranto* where this court ordered it to be tried in a specified county. *State v. Townsley*, 56 Mo. 107. (c) Changes of venue will not lie from one circuit court to another, from the hearing of a petition for the opening of a public road, unless the statute grants the right. *Ex parte Williams*, 4 Yerg. (Tenn.) 580. (d) The statute authorizing a change of venue from a justice of the peace in a case of assault and battery does not warrant a change of

venue where the proceedings are before the court of criminal correction. *State v. Zeppenfeld*, 12 Mo. App. 573. (e) In a "suit" pending before the probate court neither party to the "suit" is entitled to a change of venue, and the action of a probate judge in granting a change of venue was condemned by the St. Louis Court of Appeals and held to be without authority of law. *Morris v. Lane*, 44 Mo. App. 1. (f) There is no general and inherent power in courts to remove a cause pending therein to another court. But that power can only be given by statute, and the statute must be complied with. And it was held in Michigan that while the policy of the State did not favor the action of judges trying cases where they had been of counsel, the jurisdiction of the court was not taken away because of the incapacity of the judge to sit in a given case; and it was held that every case must remain in the court where it originated until removed by lawful authority. *Shannon v. Smith*, 31 Mich. 451. (8) This is not a "suit"—which is a controversy between a "plaintiff" and a "defendant;" this is an independent and special statutory proceeding authorizing contiguous landowners to incorporate a *quasi* public corporation for a particular purpose. The only resemblance it bears to a suit is the fact that non-petitioning landowners are notified by "summons" or an "order of publication," as in civil cases. *Laws 1905*, p. 191; *L. & S. Co. v. Miller*, 170 Mo. 240. (9) An examination of the statute under which these drainage proceedings were instituted will convince any reasonable mind that the statute is complete in itself and that the mode of procedure is exclusive. The construction contended for by respondent is unreasonable, for if the proceedings for the incorporation of a drainage district is a "civil suit" within the meaning of the code, then the proceedings would have to be brought in every county where the lands are situated, as pro-

vided by the statutes. Section 8253, Laws 1905, page 120, provides that any owner of real estate who has not signed the "articles of association" may object to the organization and incorporation of the drainage district by filing "objections" on or before the first day of the term of the court. The statute limits his objections, however, as follows: 1. "Why such drainage district should not be organized and incorporated." 2. "Why his land or any part thereof will not be benefited by the proposed drainage." The objections thus made, and they are all that he is permitted to make, shall be heard by the court in a "summary manner, without unnecessary delay," and in case the objections are overruled, the circuit court shall by its order, duly entered and recorded, "declare and decree said drainage district to be a public corporation of this State." The real purpose of the statute up to this state of the proceedings is to secure a decree declaring the proposed drainage district a corporation. *Land & Stock Co. v. Miller*, 170 Mo. 240.

John A. Hope for respondents.

(1) If the drainage proceeding is anything that can be entertained at all by the circuit court, it is a civil suit within the meaning of the change of venue statute. 2 Bouvier's Dict., p. 1065; *Hockemeyer v. Thompson*, 150 Ind. 176; *Bass v. Elliott*, 105 Ind. 517; *Weston v. Charleston*, 2 Peters (U. S.) 467; *Pac. Ry. cases*, 115 U. S. 5. "Civil suit" in the change of venue statute must mean the same as "civil case" in the section of the Constitution defining and limiting the jurisdiction of circuit courts to "criminal cases" and "civil cases;" therefore, if this drainage matter is not a "civil suit" relators have no case in the circuit court; on the other hand, if it is a civil suit, respondents are entitled to a change of venue. Sec. 22, art. 6, Const.; sec. 818, R. S. 1899. A change of venue is authorized, notwithstand-

ing it is a special statutory proceeding, and although there is no provision for change of venue in the special statute regulating the proceeding. *Railroad v. Fowler*, 113 Mo. 466; *Manson v. Coleman*, 86 Mo. App. 23; *State ex rel. v. Smith*, 176 Mo. 97; *Nash v. Craig*, 134 Mo. 354. (2) "The rulings of the circuit court on the application for a change of venue are reviewable by appeal, writ of error or *certiorari*, either of which remedies is adequate for the alleged errors complained of herein, and having other adequate remedies, relators are not entitled to have the proceedings of the circuit court reviewed, set aside or interfered with by the writ of prohibition." *Eudaley v. Railroad*, 186 Mo. 399; *State ex rel. v. Evans*, 184 Mo. 632; High, Extra. Rem. (3 Ed.), sec. 765. The question whether or not the change of venue statute (sec. 818) applies to special statutory proceedings has been pronounced by this court "debatable both on principle and authority." *State ex rel. v. Evans*, 184 Mo. 642. It will not be denied, we assume, that the action of Judge Riley on the motion for change of venue, whether it was erroneous or not, can be reviewed on appeal, or, if no appeal lies, by *certiorari*; nor can it be disputed that the general rule is that prohibition will not issue when these other remedies exist. The question then is, does the fact that the material prosperity of certain private interests and their plan to enrich themselves at the expense of others will be promoted, justify a departure from the general rule and the issuance of this writ when there are other remedies?

WOODSON, J.—In September, 1905, the relators and other landowners in the counties of Bollinger, Cape Girardeau, Dunklin, New Madrid, Pemiscot, Scott and Stoddard filed in the office of the clerk of the circuit court of New Madrid county "Articles of Association" for the formation and incorporation of a

drainage district for the reclamation of swamp and overflowed lands, located in those counties. The articles of association were drawn in conformity with article 3, chapter 122, of the Revised Statutes of Missouri, 1899, and the amendments thereto, approved April 8, 1905, relating to swamp and overflowed lands; and prayed for an order of said court incorporating the landed territory, described in said articles, into a drainage district, to be known as the Little River Drainage District.

The articles of association and the petition so filed conform to all the requirements of the said statute and act before mentioned, and all the non-petitioning land-owners of the district either entered their appearance, were personally served or duly notified by publication, as provided in the statute.

It is alleged in the articles of association and the petition that New Madrid county had within its boundaries a greater portion of the land proposed to be embraced in said drainage district than has any of the other counties mentioned, and for that reason the suit was begun in that county. The summons was returnable the first day of the March term, 1905, of that court.

On the 21st of March, 1906, respondents, Louis and Mary H. G. Houck, filed objections to the incorporation of the said drainage district, which were of great length.

No further order was made by the court at that time, but, by consent of the parties, the hearing of the objections was continued until July 7, 1906.

On said last day respondents, Louis and Mary Houck, filed in said cause an application for a change of venue, which, omitting the caption, is as follows:

"Now come Louis Houck and Mary H. G. Houck, objectors and defendants in the above-entitled cause, and respectfully state that they cannot have a fair

and impartial trial of said cause in the circuit court of New Madrid county, Missouri, for the reason that the opposite parties in said cause, to-wit, plaintiffs and petitioners therein for the incorporation and establishment of said drainage district, have an undue influence over the mind of the Honorable Henry C. Riley, the judge of said court, and for the further reason that said judge is biased and prejudiced against the objectors and defendants and in favor of the said plaintiffs and petitioners in said cause;

“That information and knowledge of said bias and prejudice on the part of said judge and of the said undue influence exercised over his mind came to your petitioners for this change of venue after the last adjournment of this court and after the filing of their objections herein against the incorporation and establishment of said drainage district, and that this application for a change of venue is made as soon as practicable after the filing of said objections.

“Wherefore, the defendants and objectors pray the court to change the venue of said cause and award the same to some other court, where the causes complained of do not exist.”

The application was signed by said Louis Houck, and duly sworn to on July 3, 1906.

The relators then filed a motion to strike from the files of the court the respondent's application for a change of venue, and assigned as reasons therefor, among others, the following:

“1. That the filing of said pretended application was improvident and without any statutory authority or right.

“2. That the statute under which these proceedings were instituted for the incorporation of a drainage district makes no provision for a change of venue from the court where the proceedings are instituted, and the right to a change of venue is purely statutory, and does

not exist, except in those instances where the statute authorizes it.

"3. That the pretended application for a change of venue is insufficient in form, and does not comply with the statute in that it does not state when the alleged information came to the knowledge of Louis Houck.

"4. That the pretended application was filed without giving notice to the adverse party.

"5. That the statute, under which these proceedings were instituted, authorizing the incorporation of a drainage district, makes no provision for the granting of a change of venue, but on the contrary provides that the 'objections' shall be heard before the court in a 'summary manner, and without unnecessary delay,' and that this application for a change of venue was manifestly made for the purpose of delay."

The relator's motion to strike out was at once taken up by the court, and after it had been seen and heard was by the court overruled, to which ruling and action of the court the relators duly excepted at the time.

Thereupon, the court took up the application of the respondents, Louis and Mary H. G. Houck, and announced from the bench that said application would be sustained, and the venue in said proceeding (the formation and incorporation of said drainage district), would be changed from New Madrid county to some other county.

To this action of the circuit court the relators objected and excepted at the time.

Thereupon, the relators requested said circuit court to withhold its order and judgment in granting a change of venue and sending said proceedings for the incorporation of a drainage district to some other county until relators could be heard in this court, and ascertain whether or not the respondents, Louis and Mary

H. G. Houck, were entitled to a change of venue under the statute authorizing a circuit court to incorporate a drainage district. This latter request was by the circuit court granted.

Thereupon, relators instituted this proceeding, in this court, praying for a writ of prohibition, prohibiting the Hon. Henry C. Riley, judge of the New Madrid Circuit Court, from granting said change of venue, and prohibiting Louis and Mary Houck from further prosecuting their said application for a change. This court issued a provisional writ, requiring respondents to show cause why a permanent writ should not issue. The answer and returns of the respondents substantially admit the facts before stated, and insist:

First. That the action of said judge was within the limits of his lawful jurisdiction, and that he had a right to take up and dispose of said application for a change of venue in the same manner, and in the same way, as though the proceedings for the incorporation and information of a drainage district was a "civil suit" within the meaning of section 818, Revised Statutes 1899.

Second. That if the respondent judge committed error in holding that a change of venue would lie in a proceeding relating to the formation of a drainage district, it was reviewable on appeal, and that prohibition for that reason would not lie.

Respondents Louis and Mary Houck in their separate return set up many other reasons why they should be discharged, which go to the merits of the case and have no bearing upon the issues presented here, and for that reason they will not be further noticed.

OPINION.

I. There are but two points presented in the case for the court's determination, and they are: whether or not the circuit court of New Madrid county was

exceeding its lawful jurisdiction in holding that the venue in a proceeding for the incorporation of a drainage district could be changed from that county to some other county; and whether or not this court in this character of proceeding can review the assigned errors of the trial court.

We will consider these questions in the order mentioned.

If this proceeding is a civil suit within the meaning of section 818 of the Revised Statutes of Missouri, 1899, regarding changes of venue in civil suits, then the circuit court of New Madrid county was not exceeding its lawful jurisdiction when it announced its purpose to grant the change of venue to some other county in the State, and in that case the provisional writ should be quashed; but if, upon the other hand, such a proceeding as this is not such a suit within the meaning of said section, then said court was at that time transcending its jurisdiction, and the provisional writ should be made permanent.

The respondents contend for the affirmative of this proposition, while the relators maintain the negative thereof. The issue thus joined requires us first to determine what is a "civil suit" within the meaning of the statute.

Mr. Webster says that the word civil means (5), "Relating to rights and remedies sought by action or suit."

Civil remedy (Law), "That given to a person injured by action, as opposed to a criminal prosecution."

Civil suit, "A suit for a private claim or injury."

Bouvier defines the word "civil" in these words: "In contradistinction to criminal to indicate the private rights and remedies of men as members of the community in contrast to those which are public and relate to the government; thus, we speak of civil process and

criminal process, civil jurisdiction and criminal jurisdiction."

"Civil Action. In Practice."

"In the Civil Law." "A personal action which is instituted to compel payment, or the doing some other thing which is purely civil."

"At Common Law." "An action which has for its object the recovery of private or civil rights, or compensation for their infraction." [1 Bouvier Law Dict. (Rawle's Revision), p. 329.]

The word "suit" in practice means, "An action." "It is more general than 'action,' which is almost exclusively applied to law and denotes any legal proceeding of a civil kind brought by one person against another."

"'Suit' is a generic term of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of any injury, or the recovery of a right." [2 Bouvier's Law Dict. (Rawle's Revision), p. 1065.]

Mr. Webster defines the word "case" to be, "A state of facts involving a question for discussion or decision; especially a cause or suit in court."

Bouvier defines the word to mean, "A question contended before a court of justice. An action or suit at law or in equity." [1 Bouvier's Law Dict. (Rawle's Rev.), p. 288.]

Mr. Webster says, 4. (Law), the word "suit" means, "The attempt to gain an end by legal process; an action or process for the recovery of a right or claim; legal application to a court of justice; *prosecution* of right before any tribunal; as a civil *suit*; a criminal *suit*; a *suit* in chancery."

It will be seen from an examination of these various definitions that the phrases, "civil case" and "civil

suit," refer to the legal means by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words "criminal cases," which refer to public wrongs and their punishment; and that the word "case," when considered alone, means the facts, or the state of facts which constitute the rights of the individual, or his cause of action, which the "*proceeding*," "*action*" or "*suit*" protects or enforces.

This court has repeatedly held that in the construction of a statute, "the words of the law are to be taken in their ordinary, usual and natural meaning." [Henry & C. Co. v. Evans, 97 Mo. 55; McFarland v. Railroad, 94 Mo. App. 340.]

The same rule of construction applies to a constitutional provision.

"The general and primary rule of construction requires that words, when there is nothing to indicate that they are used in a particular sense, shall be given their ordinary or popular meaning." [Smith v. Railroad, 143 Mo. l. c. 37, 38; Martin v. Hunter, 14 U. S. 326.]

It might not be out of place here to state that the authorities before cited attach to the word "suit" a broader and more comprehensive meaning than is given to the word "action" or "case;" and it is of some significance that the broader term is used in the change of venue statute rather than the one employed in the Constitution regarding the jurisdiction of the circuit court. Section 22 of article 6 of the Constitution of 1875, stripped of all passages unimportant in this inquiry, provides that, "The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all '*civil cases*' not otherwise provided for." The evident intent was to confer upon litigants the right to a change of venue in cases pending in courts other than the cir-

cuit, consequently the Legislature extended that right to cases pending before justices of the peace and in the criminal court. We mention this fact simply to show the liberal spirit with which the lawmakers have dealt with the question of change of venue.

The wording of that statute, in so far as it is material in this case, is as follows: "A change of venue may be awarded in any civil suit to any court of record for any of the following causes."

This question seems to have never come before this court for adjudication before, but it has received attention at the hands of other courts of this country.

In a proceeding instituted by the common council of Kansas City, before the mayor, to inquire and find the value of the property taken for the purpose of widening a street, and to assess the benefits caused by the improvement so made upon the surrounding property, the jury found the value of the property taken to be \$7,305, and assessed the benefits at \$12,325. The case was appealed to the circuit court of Jackson county. A petition for removal to the United States Circuit Court was filed in said court, because a Federal question was involved, which was resisted, because, among other reasons assigned, such a proceeding was not removable under the United States statute which provides for the removal of certain suits from the State to the United States courts. The Supreme Court of the United States, in passing upon that question, said:

"This controversy is to all intents and purposes 'a suit.' . . . We think that the case was removable to that court under the act of March 3, 1875." [Pacific Railroad Removal Cases, 115 U. S. 5, 6, 17, 23.]

In Indiana an act of the Legislature created a "superior court," and gave to it "concurrent jurisdiction with the circuit court in all cases of appeal from

. . . boards of county commissioners, or city courts in civil cases, etc." A year after the passage of said act, a drainage act was passed, and the section thereof authorizing an appeal is general and does not designate the court to which the appeal is to be taken. After the passage of the latter act, a proceeding was instituted before the board of commissioners for the construction of a ditch under the provisions of the drainage act. From the judgment of the board establishing the drain, the appellants appealed to the superior court of Allen county. That court, on the motion of appellant, dismissed the appeal on the ground that no appeal to that court was authorized by law in such cases. The case was then appealed to the superior court, and in discussing that act, the court said: "It gives the superior court 'concurrent jurisdiction with the circuit court in all cases of appeals from . . . boards of county commissioners and mayors of [or] city courts in civil cases, etc.'" Continuing, the court said: "It is suggested that a drainage proceeding under the drainage act is not a civil case, and, therefore, the act does not confer jurisdiction of appeals on the superior court. To this it may be answered that no other proceeding before the board of commissioners is a civil case in the strict sense, and yet appeals are authorized from boards of commissioners to the superior court. The phrases 'civil cases' and 'civil causes' as used in the section quoted were evidently used in contradistinction to criminal cases, for the purpose of including all cases other than criminal cases. . . . This language was evidently intended to vest all appellate jurisdiction in the superior court which was then vested in the circuit court, except in criminal cases." [Hockemeyer v. Thompson, 150 Ind. l. c. 178.]

In another case in Indiana, Bass and Gordon filed their petition in the circuit court, praying for the location and construction of a ditch or drain under the

drainage act; commissioners were appointed; they made their report to the court, and certain exceptions thereto were filed, and, thereafter, Elliott and others filed an application for a change of venue from the judge of said court, which was sustained. The cause was later appealed to the superior court, and the first error complained of was the action of the trial court in granting the change of venue. That court said: "It is claimed by counsel that a cause such as this is not a civil action, but a special proceeding under the statute concerning drainage; and, as that statute contains no provision for a change of venue from the judge . . . counsel contend with some force and plausibility that the court erred in sustaining the motion for a change of judge. But, under the recent decisions of this court, the construction of appellants' counsel is untenable and cannot be sustained. Thus, in *Neff v. Reed*, 98 Ind. 341, it was held substantially that a proceeding for a location and construction of a ditch or drain, under the statute concerning drainage, was so far a civil action that the provisions of the civil code in relation to a motion for a new trial, were allowable and applicable to such proceeding. So, also, in *Crume v. Wilson*, 104 Ind. 583, the court said: 'We are of the opinion that in drainage cases the modes of procedure and the rules of practice prescribed by our civil code may properly be used to supply omissions in the drainage statutes.' Accordingly, it was there held that, although there is no provision of our drainage statute which authorizes the petitioner for a drain to dismiss his cause at any time, of his own motion, yet the provisions of section 333, R. S. 1881, in relation to the dismissal of a civil action by the plaintiff, were applicable to drainage cases, and the petitioner for a drain might thereunder, at the proper time, dismiss his petition. Applying the doctrine of the cases cited to the case in hand, we have no difficulty in reaching the conclusion that a proceed-

ing for the location and construction of a ditch or drain, under our drainage statutes, is so far a civil action that the provisions of sections 412 to 417, R. S. 1881, in relation to a change of venue from the judge, . . . must be held applicable to such a case as the one under consideration." [Bass v. Elliott, 105 Ind. l. c. 518, 519.]

According to the definitions and the foregoing authorities it is clearly deducible that the words "civil cases" as used in the Constitution and "civil suits" as employed in our civil code mean the proceeding, actions, or suits by which private rights are protected, enforced, or their violation redressed. We are, therefore, of the opinion that a proceeding under our statute for the incorporation of a drainage district is so far a civil suit that the section in relation to changes of venue is applicable to such proceedings. This conclusion is supported by the language of Judge BLACK in a condemnation proceeding for a right of way for a railroad, which is as follows:

"It is true the statute makes no specific provision for raising these or like issues, but it is utterly unreasonable to say that the defendant must be notified when the petition will be heard, and yet, when he appears, he cannot be heard to show that the petitioner has no right to condemn the particular property for the alleged use." [Railroad v. Railroad, 94 Mo. l. c. 543.] This case shows to what great length this court will go in order to apply the provision of the civil code to this class of special proceedings.

One of the most, if not the most, important steps in these drainage proceedings is the incorporation and the establishment of its boundaries. Under the broad and liberal provision of the drainage act very serious injury might be inflicted upon the property-owners if they were denied a fair or impartial trial at this stage of the proceeding.

We have been cited to some cases of other States, which counsel for relators contend oppose the conclusions here reached, and support his theory of the case. Among them is the case of *Cooke v. Cooke*, 41 Md. 362. The question of a right to a change of venue arose in that case under a constitutional provision which provided for the change of venue in several different kinds of actions at law, but made no provision regarding equity cases. The Supreme Court held that a change of venue in an equity case would not lie under that provision of the constitution. While the wording in some particulars is similar to the wording of our statute upon that subject, yet a careful reading of the opinion will show that the court placed but little reliance upon the wording, but disposed of the case upon the former ruling of the court and the policy of their law. The other cases cited have but little bearing or weight in this case.

II. "The object and purpose of a writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance." [2 Bailey on Jurisdiction, sec. 449; *Smith v. Whitney*, 116 U. S. 167; 16 Ency. Plead. & Prac., p. 1093.]

The writ is equally appropriate and available to keep such a court within the boundaries of its lawful power in given cases, no less than to prevent its cognizance of causes not consigned to its jurisdiction. [*State ex rel. v. Slover*, 126 Mo. 652; *State ex rel. v. Withrow*, 133 Mo. 500; 2 Bailey on Jurisdiction, sec. 447; Const. of Mo., 1875, sec. 3, art. 6; *Railroad v. Wear*, 135 Mo. 230; *State ex rel. v. Spencer*, 166 Mo. 271.]

It is not the purpose of the writ to correct errors of the trial court. If the application for a change of venue was not in conformity to the mandates of the statute, or if the proper notice was not given, then the

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proper procedure was by appeal. If the court whose action is complained of acts within its jurisdiction, the writ of prohibition will not lie, however erroneous the action may be which the superintending tribunal is asked to prohibit. [State ex rel. v. Moehlenkamp, 133 Mo. 134; State ex rel. v. Laughlin, 10 Mo. App. 1; State ex rel. v. Lubke, 29 Mo. App. 555; State ex rel. v. St. Louis Court of Appeals, 99 Mo. 216.]

For the reasons before stated, the permanent writ is denied, and respondents are discharged from the rule.

All concur.

THE STATE v. MARTIN PAULSGROVE,
Appellant.

Division Two, April 2, 1907.

1. **TRANSCRIPT: Criminal Cases.** Counsel in a criminal case should superintend the making up of the transcript, and see to it that it is properly certified and otherwise complies with the law and the rules of the court.
2. **INSANITY: Instruction: Excuse: Omission of Word "Always."** The instruction should tell the jury that "partial insanity does not always excuse," and the word "always" should not be omitted. But where, upon a reading of the whole instruction from which that word is omitted, it seems impossible that the jury could have been misled by that inadvertent omission, it will not be held to be reversible error.
3. ———: **Excuse for Crime.** One may be partially insane and yet responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the accused incapable at the time of committing the offense of distinguishing between the right and the wrong in reference to the particular act charged and proven against him.

4. ———: **Instruction: Proof: Like any Other Fact: Insertion of Word "Not."** In one instruction given for the State the jury were told that "insanity is a fact which may not be proven like any other fact." *Held*, that the word "not" was incorrectly incorporated, but that was so plainly an inadvertence that, when all the instructions given are considered together, it cannot be seen that it had any prejudicial effect upon the rights of defendant.
5. ———: **Question for Jury.** Where the instructions given on both sides fairly and fully submit to the jury the issue as to the sanity or insanity of the defendant and his criminal responsibility in the killing of his sweetheart, and there is evidence that tends to support the defense that he was not responsible for the homicide and ample evidence to the contrary, and no error was committed in the admission and exclusion of evidence, the issue is one for the jury to determine; and if their finding is free from bias and prejudice, the court will not interfere therewith.
6. ———: **Instruction for Murder in Second Degree.** Where there is no evidence of just provocation and defendant is clearly guilty of murder in the first degree or excusable on the ground of insanity, the court should not direct the jury that if defendant in an excited and passionate frame of mind, without adequate cause or provocation, killed the deceased, they will find him guilty of murder in the second degree. No instruction on murder in the second degree should be given in such case.
7. ———: **Instruction on Manslaughter.** An instruction that seeks to have the court instruct on manslaughter in the fourth degree if the defendant killed deceased because she refused to marry him, should be refused. Unless there is some evidence tending to show a lawful provocation for the homicide, no instruction for manslaughter in the fourth degree should be given.
8. ———: **Instruction on Circumstantial Evidence.** Where the defense is insanity and all the evidence as to defendant's mental condition was open, direct and oral, and there was no circumstantial evidence about who committed the homicide, an instruction which seeks to submit to the jury the law as to a conviction upon circumstantial evidence would be misleading and should be refused.
9. **REFUSING CORRECT INSTRUCTIONS.** Where the instructions given fully and fairly cover every issue in the case, a refusal of correct instructions asked by defendant, is not error.

Appeal from DeKalb Circuit Court. — *Hon. A. D. Burnes*, Judge.

AFFIRMED.

Herbert S. Hadley, Attorney-General, and *John Kennish*, Assistant Attorney-General, for the State.

(1) Only the record proper is before this court for review. (a) No authenticated bill of exceptions appears as part of the record in this case. What purports to be a bill of exceptions does not contain the instructions, the motion for a new trial or motion in arrest of judgment, and is not signed by the judge nor certified to by the clerk of the court. *State v. Baty*, 166 Mo. 561; *Reno v. Fitz Jarrell*, 163 Mo. 411. Copying the motions for a new trial and in arrest in the record proper does not preserve them in the bill of exceptions. *State v. Revely*, 145 Mo. 666; *State v. Griffin*, 98 Mo. 672. (b) It is shown by the record that the motions for a new trial and in arrest of judgment were filed after judgment and sentence, nor was any objection made when judgment was rendered nor motion by defendant to set the same aside in order that motions for a new trial and in arrest of judgment might be filed. The motions for a new trial and in arrest must be filed before judgment. R. S. 1899, secs. 2689, 2690; *State v. Rosenblatt*, 185 Mo. 114; *Willis v. State*, 62 Ind. 391. (2) The court did not err in giving instructions to the jury on behalf of the State. Fifteen instructions were given on behalf of the State covering the subjects of murder in the first degree, the presumption of innocence, reasonable doubt, absence of motive and credibility of witnesses, and as to the effect of statements made by defendant concerning the offense charged. These instructions were in accordance with approved precedents. Instructions were also given fully covering the law of insanity, and were in

conformity with the precedents of this court on that subject. *State v. Pagels*, 92 Mo. 314; *State v. Duestrow*, 137 Mo. 44; *State v. Speyer*, 182 Mo. 66; *State v. Church*, 199 Mo. 605. In instruction 6, given on behalf of the State, the word "not" seems to have been omitted by mistake, but as the same subject was fully and correctly covered by instruction 10, given on behalf of defendant, the jury could not have been misled by such mistake. (3) Ten instructions were given on behalf of defendant, and presented the law of the case in at least as favorable form as the defendant was entitled to. Of the seventeen instructions asked by defendant, seven were properly refused by the court. The first because under the law the defendant was not entitled to an instruction on the theory of murder in the second degree. *State v. Speyer*, 182 Mo. 77; *State v. Holloway*, 156 Mo. 222; *Baldwin v. State*, 12 Mo. 223. The second, because the court had fully instructed on that question in instruction 3 given on behalf of defendant. The third, because the question sought to be presented therein was fully covered by instruction 3 given on behalf of the State, and 5 given on behalf of the defendant. The fourth, because there was no evidence in the case to authorize an instruction on manslaughter in the fourth degree. *Baldwin v. State*, supra. The fifth and sixth, because the court had fully instructed on the questions of law presented therein. The seventh, because defendant is not entitled to an instruction on circumstantial evidence in a case where the defense is insanity. *State v. Soper*, 148 Mo. 239.

GANTT, J.—From a conviction and sentence for murder in the first degree by the circuit court of DeKalb county, the defendant has appealed to this court.

This prosecution was commenced on the 20th of January, 1905, by the filing of an information by the prosecuting attorney of Andrew county in the office

of the clerk of the circuit court of said county in vacation, charging the defendant with murder in the first degree of Mary Newman. At the May term, 1905, the cause was set down specially for trial on the 29th of August, 1905. On the last-mentioned date, the defendant was duly arraigned and a plea of not guilty entered. On a proper application, a change of venue was granted to DeKalb county. At the October term, 1905, of the DeKalb court, the defendant was tried and convicted of murder in the first degree. Motions for new trial and in arrest of judgment were filed and overruled and the defendant duly sentenced by the court. The defendant is not represented in this court by counsel and this has necessitated an examination of the whole record by this court.

The testimony discloses that at the time of the homicide, the 18th of January, 1905, the defendant was an unmarried man about twenty-four years of age, and resided in Andrew county. He had served as a soldier in the Army of the United States in the Philippine Islands for probably two years, and after the return of his regiment to the United States, he was discharged and returned to Andrew county in the early part of 1904. The father of the defendant resided on a farm in Andrew county seven miles east of Savannah. The defendant worked as a farm hand in the neighborhood, and stayed at the home of his father part of the time. The deceased, Miss Mary Newman, lived with her parents some three or four miles distant from the Paulsgrove home. At the time of the homicide she was teaching school in the Paulsgrove neighborhood and boarding with that family. The defendant had been a suitor of Miss Newman for nearly a year after his return from the army to Andrew county, and had frequently called upon her at her own home and at his father's. He visited her at the latter place the night before the homicide. On Wednesday evening

about three o'clock, January 18, 1905, the defendant came to his father's house and remained there conversing with the members of the family until about 4:30 p. m., when Miss Newman and three of the smaller Paulsgrove children returned from school. In a few minutes after her arrival, the defendant told Miss Newman that he wanted to see her, and they went into the parlor, which seems to have been the east room on the ground floor of the building, and closed the door. After they had been in the parlor a short time, the family heard Miss Newman scream "O, Martin, don't!" Mrs. Paulsgrove ran to the parlor door, opened it, and saw the defendant have hold of Miss Newman; Mrs. Paulsgrove seized him and he then turned upon her, she jumped behind the stove, and he shot at her twice with a pistol; he then forcibly took Miss Newman from the parlor into the adjoining sitting room, the latter struggling and resisting until she fainted. He then pulled her upon the bed in the sitting room, and shot her twice through the head, each of which wounds was mortal.

The defendant, prior to the homicide, had tried to buy a revolver at different places, saying he wanted to shoot rabbits. About two hours before the homicide, he bought a revolver at a little village called Kodiak about two miles from the Paulsgrove residence.

For some time before the homicide the defendant had told a number of people in the neighborhood of his affection for Miss Newman, and to several had stated that he intended to be married to her. On one occasion, when he was told not to be too sure of it, that she might go back on him, he replied with an oath that if she did, he would shoot her.

Just after the shooting of the deceased by the defendant, he went out of the house on the north side and said, "I loved her and she threw me away, I could not stand it, and I killed her." He remained

at his father's house about half an hour after the shooting. During that time he cut the telephone wire and said to his half brother, "Do not speak a word, you have done me enough dirt, but I will let you go this time." He then left his home and went to Savannah, where he was arrested about ten o'clock that night.

The defense was insanity. The depositions of five soldiers, a lieutenant of the company in which he served in the Philippine Islands, and four other members of the company, were read in evidence and tended strongly to prove that the defendant was insane during the time of his service in the Philippines. There were other witnesses also, who had known the defendant in the neighborhood in which he lived and had been reared, whose testimony tended to prove that the defendant was not of sound mind. On the other hand, the State introduced a large number of witnesses, including the neighbors and farmers for whom the defendant had worked, and other testimony covering the defendant's life from his boyhood until the date of the homicide, which tended to prove that he was not insane; that while he was not of a very bright mind, he was reasonably intelligent and of sound mind, and that he was an exceedingly trustworthy and industrious boy and man in the performance of his work as a farm laborer and an employee of the dairy company.

The information is in all respects sufficient and according to the often approved precedents, and it is therefore unnecessary to set it forth at length. It was duly verified by the prosecuting attorney.

The court submitted the case to the jury upon an issue of murder in the first degree, and upon a plea of not guilty and a plea of insanity. The court defined the words "wilfully," "feloniously," "deliberately," "premeditatedly," "malice" and "malice aforethought" as those words have often been defined in instructions which have met the approval of this

court. And also gave the usual instructions on the presumption of innocence, reasonable doubt, the credibility of the witnesses and good character, and then the court instructed the jury as follows:

“Insanity is a physical disease located in the brain, which disease so perverts and deranges one or more of the mental and moral faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong, in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and society. Wherefore, the court instructs the jury that if they believe and find from the evidence that the defendant, at the time he did the killing alleged in the information, was so perverted and deranged in one or more of his mental and moral faculties as to be incapable of understanding at the time he killed Mary Newman that such killing was wrong, and that he, the defendant, at the time was incapable of understanding that this act of killing was a violation of the laws of God and society, they should find him not guilty. Insanity is either partial or general. Total insanity always excuses. Partial insanity does not excuse. One may be partially insane and yet be responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the person incapable at the time of its commission of distinguishing between right and wrong in reference to the particular act charged and proven against him. The law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the act complained of must, before you can acquit on that ground, be established by the evidence to your

raisonnable satisfaction, and the burden of proving this fact is upon the defendant."

No. 6. "The law presumes every man is sane until the contrary is established by the evidence to the satisfaction of the jury, and when insanity in any form is set up as a defense, it is a fact which may not be proven like any other fact. The burden of proving such insanity is on the defendant, and he is not entitled to the benefit of a mere doubt whether he was or was not insane."

No. 7. "The jury are further instructed that excitement, passion and angered feelings or revenge produced by motives of anger, hatred or revenge is not insanity, and that the law holds the wrong doer of an act under such conditions responsible for his acts, and the jury have no right to excuse or in anywise justify or mitigate defendant's act in the taking of Mary Newman's life, except they can do so under and according to law as declared in these instructions."

No. 8. "The court instructs the jury that mere weakness of intellect will not shield one who commits a crime, and in this case, although you may believe from the evidence that the defendant is mentally deficient in some degree, yet, unless you are reasonably satisfied by the evidence that at the time the alleged crime is charged to have been committed by the defendant, his mental faculties were so weak and his mind so deficient that he was unconscious at the time of committing the act that it was wrong, and that he ought not to do it, and that he had not the ability or mental capacity to choose between right and wrong, you will find the defendant guilty as charged in the information."

Among other instructions the court gave the following at the request of the defendant:

No. 1. "The information in this case is a mere formal charge against the defendant, and of itself is no

evidence whatever of his guilt, and no juror should permit himself to be in any degree or to any extent influenced by it."

No. 2. "The court instructs the jury that, on the question of sanity or insanity of the defendant, you will consider all of the evidence offered in the case, the life, habits, conduct and mental condition of the defendant from his early manhood to the present time, so far as the same are shown in evidence, the homicide itself and all of the circumstances attending it; the absence or presence of any motive for the conduct of defendant, as shown by the evidence, and all the testimony bearing on his sanity or insanity. And if you find that the defendant was at the time of the homicide insane and irresponsible from any disorder or disease of the brain, resulting in such a derangement of the mental faculties that he had not the capacity to distinguish right from wrong as to the act with which he is charged, then the defendant is not responsible in law, and you ought to find him not guilty."

No. 3. "The court instructs the jury that if they believe from the evidence that the defendant was insane or of unsound mind at any time or times prior to the shooting charged in the information, with lucid intervals, or partially lucid intervals or periods in which the defendant knew right from wrong, then and in that case it devolves upon the State to prove by a preponderance of the evidence given in the case that at the time the fatal shot was fired that took the life of the deceased, the defendant was at the time in one of his lucid or partially lucid intervals or periods."

No. 5. "You are further instructed that the law presumes the defendant innocent of the offense charged against him; and the burden of the proof rests on the State to show to the jury from the evidence in the case his guilt beyond a reasonable doubt. If you have a reasonable doubt of defendant's guilt, you should ac-

quit him; but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence."

No. 6. "The jury are instructed that when the evidence fails to show any motive on the part of the defendant to commit a crime charged, this is a circumstance in favor of his innocence, and in this case, if the jury find, upon a careful examination of all the evidence, that it fails to show any motive on the part of the defendant, Paulsgrove, to commit the crime charged against him, then this is a circumstance which the jury ought to consider, in connection with all the evidence in the case, in making up their verdict. In order to ascertain whether or not a motive existed on the part of said defendant to commit the crime charged against him, they will take into consideration all the evidence in the case."

No. 8. "If, after fully and deliberately weighing and considering all the evidence before them in this case, the jury entertain any reasonable doubt of the defendant's guilt, they must give him the benefit of such doubt and acquit him. A juror is understood to entertain a reasonable doubt when he has an abiding conviction of mind founded on the evidence to a moral certainty that the defendant is not guilty as charged."

No. 9. "By the terms 'preponderance of the testimony,' and 'burden of proof,' as used in the instructions in this case, is meant the greater weight of the testimony in the case."

No. 10. "The jury are instructed that the plea of insanity or imbecility of mind is a lawful one in this case, and to establish the insanity or imbecility of the defendant, positive and direct proof of it is not required by law, and to entitle him to an acquittal by reason of his mental insanity or imbecility of any

character, circumstantial evidence, which reasonably satisfies your minds of its existence, is sufficient.”

The defendant prayed other instructions which were refused and they will be noted in the course of the opinion.

I. It is insisted by the Attorney-General that the court should only examine the record proper on this appeal on account of the manner in which the transcript has been certified to us. There is much force in the contention. It is greatly to be regretted that counsel in these criminal causes, especially where a charge is so grave as in this case, do not superintend the making up of the transcript. After a consideration, however, of all the matter certified by the clerk, and inartistically as the record is made up, in view of the gravity of the charge, we have felt it our duty to consider the whole record, matters of exception as well as the record proper.

II. The issue was simple and single and the controlling question submitted to the jury was whether the defendant was sane or insane when he shot and killed Miss Newman. The evidence left not a shadow of a doubt that the defendant shot and killed Miss Newman, and upon the conclusion of the evidence and the instructions of the court, there was no middle ground left for the jury to occupy under the evidence and the law. They were bound either to find the defendant guilty of murder in the first degree, or acquit him on the ground that by reason of his insanity he was not responsible for his act in killing the deceased. And this was the view taken by the learned circuit court as indicated by his instructions to the jury. The reading of the instructions on the subject of insanity will show that they are in harmony with the law of this State on that subject since the case of *Baldwin v. State*, 12 Mo. 223. There is, it is true, the omission of one

word in the fifth instruction given for the State, wherein the court says, "Partial insanity does not excuse." The word "always" by an oversight is left out, but when the whole instruction on that subject is read together, it seems to us impossible that the jury should have been misled by this inadvertent omission of the word "always." The court properly declared the law to be that one may be partially insane and yet responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the person incapable at the time of its commission of distinguishing between the right and the wrong in reference to the particular act charged and proven against him. And this was the view announced in the instructions asked by the defendant and given by the court. In the sixth instruction given for the State the word "not" was incorrectly and inadvertently (evidently) incorporated in the instruction, but the use of the word "not" in this instruction is so plainly an inadvertence that when we consider all the instructions together, we cannot believe that it had any prejudicial effect upon the rights of the defendant. Taking the instructions given on both sides of the question together, we think the issue as to the sanity or insanity of the defendant and his criminal responsibility for the killing of Miss Newman, was fairly and fully submitted to the jury. And the evidence called for the instructions as given. It was a question of fact which the jury alone were authorized to pass upon under the instructions of the court, and while there was evidence tending to support the claim of the defendant that he was not responsible for his act, it was too obvious for discussion that there was ample evidence from which the jury could find that the defendant was sane at the time he shot and killed the deceased and knew the right from the wrong of his act in so doing. There is nothing in the finding of the jury on this point that smacks of bias or

prejudice, or that would justify this court in assuming the prerogative of the jury in weighing the evidence and reaching a different conclusion. We have too often decided that we will not invade the province of the jury and attempt to pass upon the weight of the evidence.

III. We have carefully considered the various objections made during the progress of the trial to the admission and exclusion of evidence. The defense was insanity and the court was exceedingly liberal in allowing the defendant great latitude in his efforts to establish his insanity. Without recapitulating each item of evidence to which objection was made, it must suffice to say that we have been unable to find any ruling on the admission or exclusion of evidence that could be said to be prejudicial to the defendant.

IV. This brings us to a consideration of the instructions asked by the defendant and refused by the court. The first of these instructions sought to have the court direct the jury that if the defendant in an excited and passionate frame of mind without adequate cause or provocation, killed the deceased, then they would find him guilty of murder in the second degree. There was no error in refusing this instruction, because there was not a particle of evidence which would have justified the jury in finding the defendant guilty of murder in the second degree. There was no just provocation which would have reduced the homicide to murder in the second degree. And all the evidence tended to show that if the defendant was sane, he was guilty of murder in the first degree, or nothing. [State v. Speyer, 182 Mo. 77; State v. Holloway, 156 Mo. 222; Baldwin v. State, 12 Mo. 223.]

No error occurred in the refusal of the second of these refused instructions, because the court had already fully instructed on that question in the instruc-

tion numbered three given at the instance of the defendant. Likewise the court properly refused the third of these refused instructions, because it had fully covered the proposition involved by its instruction numbered three given in behalf of the State and instruction numbered five given for the defendant.

The fourth of these instructions which the court refused sought to have the court instruct on manslaughter in the fourth degree, if the defendant killed the deceased because she refused to marry him. There was no evidence in the case which would have authorized the court to instruct on manslaughter in any degree. There was not a scintilla of evidence tending to show the slightest lawful provocation for the homicide.

The fifth and sixth of these refused instructions had already been fully covered by the instructions for the State and the defendant, and it was not error to refuse to repeat them.

The last of these refused instructions sought to submit to the jury the law as to a conviction upon circumstantial evidence. As was said in *State v. Soper*, 148 Mo. l. c. 239, "This instruction would have been misleading. There was no circumstantial evidence about who did the homicide, that was indisputable, while all the evidence as to defendant's mental condition was open, direct and oral. The instruction was properly refused."

V. As already said, the evidence on behalf of the State tended to prove a deliberate, premeditated case of murder in the first degree. To avoid the consequence of this proof, the defendant interposed the defense of insanity, and while there was evidence tending to establish that defense, there was a great mass of evidence on the part of the State given by the neighbors and employers of the defendant, which tended to prove that the defendant was not insane when he shot

and killed the deceased. And this question was one which was resolved by the jury against the defendant, and the jury were amply justified in reaching that conclusion.

After a careful consideration of the whole record, we have been unable to find any reversible error and it results that the judgment of the circuit court must be and is affirmed and the sentence which the law pronounces is directed to be carried into execution.

Fox, P. J., and Burgess, J., concur.

GIBLER v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Appellant.

Division Two, April 2, 1907.

1. **TOLL BRIDGE: Liability to Pedestrian.** A company which operates a public toll bridge across the Mississippi river is not a common carrier. It must keep the bridge in a reasonably safe condition for travel, and is liable to a pedestrian for negligence only for a failure to do that. But the ordinary care which it must use is care proportionate to the danger to be apprehended.
2. ———: ———: **Contributory Negligence: Reasonable Care: Question for Jury: Demurrer to Evidence.** A snow less than an inch and a half deep fell on December 8th. The next morning the snow on the street car tracks on the bridge and the wagon driveway was swept off and piled on the sidewalks of the bridge, and this was the condition when plaintiff crossed the bridge on the 10th, except that some of the snow had melted and formed slush, part of which had turned into ice. That evening when plaintiff attempted to walk across, he kept to the driveway from which defendant had partially removed the snow, and walked thereon until it was difficult, if not impossible, for him to proceed further on the driveway because of the blockade of vehicles near the toll-collector's office. He turned towards the sidewalk to avoid a team driven towards him and was then compelled to step on the sidewalk to avoid a buggy driven in his direction. After getting on the side-

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walk he made a step or two forward, but on account of the ice and slush accumulated there he slipped and fell, and his leg was broken. The bridge was 4,200 feet long, 3,168 passengers crossed it that day, and after it quit snowing on December 8th eighty men were put to work to remove the snow, and one witness testified that one side of the bridge could be easily cleaned in a half day, yet the men were still at work removing the snow and ice at the time plaintiff was injured, which was two full days after the snow fell. *Held*, that, the effect of the demurrer being to admit as true all material facts shown by the evidence, the question of plaintiff's contributory negligence was one in regard to which reasonable minds might differ, and was therefore properly submitted to the jury, as was also the question of whether the bridge was reasonably safe for persons passing over it.

3. ———: ———: **Instruction: Dangerous Obstruction: Ordinary Care.** Defendant's charge that an instruction allowed the plaintiff to recover if he stepped upon ice and slush on the sidewalk of the toll bridge, without requiring the jury to first find that such ice and slush formed a dangerous obstruction to pedestrians in passing over said sidewalk, is not well grounded in view of the fact that the instruction told the jury that "If they find from the evidence that the defendant did not exercise ordinary care in so maintaining said sidewalk with said ice and slush thereon and in permitting said ice and slush to be on said sidewalk," etc.
4. **INSTRUCTION: General: How Cured.** An ambiguous or general term in one instruction may be explained by another instruction, and a partial view may thus be supplemented, provided the whole be consistent and harmonious.
5. ———: **Ordinary Care: Definition.** An instruction which defines "ordinary care" as applied to the keeper of a toll bridge as "such care as a prudent operator of a toll bridge would exercise" instead of "such care as a person of ordinary prudence would exercise," is not misleading or confusing, as both expressions mean practically the same thing, but it is nevertheless unhappily worded.
6. ———: **Personal Injuries: Medical Services: No Evidence.** An instruction which authorizes plaintiff to recover in a personal injury case damages "for any expenses necessarily incurred by him for medicines, medical or surgical attention which the jury may believe from the evidence he has incurred by reason of said injuries and directly caused thereby" should not be given if there is no evidence on which to base it. And where the evidence on the subject consists of the testimony

of two physicians, one of whom called on plaintiff once or twice, but did not receive any compensation and only stated that he usually charged two dollars a visit, and the other that he merely examined plaintiff for the purpose of testifying as an expert, and no showing was made of plaintiff's liability for such services, or the reasonable value thereof, and of plaintiff's testimony that he did not know the amount of the doctors' bills, there is no evidence on which to base the instruction. The instruction as it stands leaves it to the jury to estimate the damages that ought to be allowed, without any evidence to enlighten them, and is therefore error.

Appeal from Audrain Circuit Court.—*Hon. H. W. Johnson*, Judge.

REVERSED AND REMANDED.

J. E. McKeighan and *Wm. R. Gentry* for appellant.

(1) The court erred in overruling the demurrer to the evidence: (a) Because the evidence showed that defendant was exercising ordinary care to clean up its bridge and keep it in safe condition. Ordinary care was all that was required of defendant in this connection. *Grigsby v. Chappell*, 5 Rich. L. (S. C.) 445. (b) Because plaintiff's own testimony shows that he was guilty of negligence in selecting the route which he chose to walk upon when he knew of the presence of the ice, slush and snow, and when by stepping back on to the thirty-four foot roadway he would have had a clean path to walk upon. Where two ways are open to walk or drive upon, one safe and the other obviously dangerous to pedestrians or drivers, and the pedestrian or driver selects the obviously dangerous one and is injured, he cannot recover. *Cohn v. City of Kansas*, 108 Mo. 387; *Wheat v. St. Louis*, 179 Mo. 572; *Ray v. Poplar Bluff*, 70 Mo. App. 252. (2) The court erred in giving improper instructions at the request of the plaintiff. (a) Plaintiff's instruction 1 was defective in that it allowed plaintiff

to recover if he stepped upon ice and slush on the sidewalk on the bridge, without requiring the jury to first find that said ice and slush formed a dangerous obstruction to pedestrians in passing over said sidewalk. *Stone v. Hubbardson*, 100 Mass. 49; *Chase v. Cleveland*, 44 Ohio St. 505; *Grossenbach v. Milwaukee*, 65 Wis. 31; *Broburg v. Des Moines*, 63 Iowa 523. (b) Instruction 3 was wrong because it permitted the plaintiff to recover for "expenses necessarily incurred by him for medical or surgical attention," when there was no evidence tending to show that he had incurred any expenses for medical or surgical attention. *Nelson v. Railroad*, 113 Mo. App. 659; *Duke v. Railroad*, 99 Mo. 349; *Smith v. Railroad*, 108 Mo. 243; *Robertson v. Railroad*, 152 Mo. 382; *Waldopfel v. Railroad*, 102 Mo. App. 529; *Rhodes v. City of Nevada*, 47 Mo. App. 499.

A. R. Taylor, E. E. Rudolph and P. H. Cullen for respondent.

(1) The court did not commit error in overruling the demurrer to the evidence, for the reason that plaintiff submitted substantial evidence tending to prove his case, which showed a prima-facie right of recovery, and plaintiff was entitled to have the probative force of his evidence determined by the jury. *Baird v. Railroad*, 146 Mo. 265; *Eichorn v. Railroad*, 130 Mo. 575; *Graney v. Railroad*, 140 Mo. 89; *Butts v. Bank*, 99 Mo. App. 172; *Ladd v. Williams*, 104 Mo. App. 390; *Knapp v. Hanley*, 108 Mo. App. 353; *Pembroke v. Railroad*, 32 Mo. App. 61. (2) The question of whether or not plaintiff was guilty of contributory negligence in continuing to use a sidewalk where he was compelled to go, and upon which there was an accumulation of ice and snow, when he might have stepped back on the driveway, which at the time and place was at least equally

as dangerous, because of teams and vehicles hurrying out from the blockade at the toll collector's office, a few rods away, was a question for the jury to decide, especially when it was shown that plaintiff was using every reasonable precaution to prevent being injured. *Loewer v. City of Sedalia*, 77 Mo. 431; *Buesching v. St. Louis Gas Co.*, 73 Mo. 220; *Hite v. Railroad*, 130 Mo. 138. (3) The question of plaintiff's right to recover was properly submitted by the court in plaintiff's first instruction. *Pembroke v. Railroad*, 32 Mo. App. 61; 1 *Thompson on Negligence*, 317; *Reno v. St. Joseph*, 169 Mo. 642. However, instruction 4, offered by defendant and given by the court, is upon the very same question; and almost identically expressed, with the further and additional words "that the plaintiff must prove by a preponderance of the evidence that said ice and slush was a dangerous obstruction to pedestrians passing over said walk on said bridge," and the rule can be here applied that if omissions in the instructions given for plaintiff are fully supplied by those given for defendant, the instructions will be regarded as invulnerable. *Goetz v. Railroad*, 50 Mo. 472; *Chambers v. Chester*, 172 Mo. 462; *Westen v. Mining Co.*, 105 Mo. App. 708; *Kennedy v. Railroad*, 103 Mo. App. 5; *Baker v. Independence*, 106 Mo. App. 507; *Liese v. Meyer*, 143 Mo. 560. (4) Instruction 2, given by the court, defining the term "ordinary care," as applied to defendant, was correct, and the court did not commit error in giving it. *Holden v. Railroad*, 177 Mo. 456; *Frieck v. Railroad*, 75 Mo. 609; *King v. Oil Co.*, 81 Mo. App. 155. (5) The court did not commit error in giving instruction 3, as to the measure of damage, for there was substantial evidence upon which to base each element of damage, including any expenses necessarily incurred by plaintiff for medical and surgical attention, which the jury may believe from the evidence he has incurred by reason of said in-

juries and directly caused thereby. *Gorham v. Railroad*, 113 Mo. 421; *Hayden v. Parsons*, 70 Mo. App. 493; *Taylor v. Iron Works*, 133 Mo. 349; *Mirrielees v. Railroad*, 163 Mo. 492.

BURGESS, J.—This is an action for damages for personal injuries alleged to have been sustained by plaintiff by reason of the negligence of defendant in allowing the sidewalk on the bridge known as the Eads Bridge, spanning the Mississippi river at the city of St. Louis, upon which plaintiff was walking as a foot passenger, to remain in a defective and dangerous condition. The suit was instituted in the circuit court of the city of St. Louis, and the venue changed to Audrain county, where the case was tried on the 1st day of July, 1904, resulting in a verdict and judgment for \$5,000 in favor of plaintiff. Defendant filed motion for a new trial, which was overruled by the court, and defendant appealed.

The petition, after reciting the incorporation of the defendant, and charging that it operated the bridge in question as a public toll bridge, alleges that on the 10th day of December, 1901, plaintiff, having paid the required toll, was lawfully on the bridge, passing from the east to the west side thereof, and that while so doing he stepped on ice and slush on the sidewalk of the bridge, which was used as a place for foot passengers to walk, and that he slipped and fell by reason of said ice and slush, breaking his thigh bone and sustaining other bodily injuries. It is charged in the petition that the ice and slush, so accumulated upon the sidewalk, constituted a dangerous obstruction to the passage of passengers over said bridge, and that defendant was negligent in allowing the sidewalk to remain in such defective and dangerous condition. The petition closes with the usual allegations as to the injuries, pain and suffering, loss of time and earnings, and charges

that the plaintiff "has incurred and will incur large expenses for medicines, medical and surgical attention and nursing, to his damage in the sum of ten thousand dollars, for which sum he prays judgment."

The answer consisted of a general denial and a plea of contributory negligence on the part of plaintiff, to which answer plaintiff replied with a general denial.

The evidence on the part of the plaintiff tended to show that on the morning of Monday, December 9, 1901, plaintiff walked across the bridge from the St. Louis side to go to work at his trade as a glazier in East St. Louis, and that as snow had fallen on Sunday, the bridge was in a bad condition for foot passengers, and many people, because of the snow and slush on the sidewalks, were walking across the bridge over the portion commonly used as a wagonway. Plaintiff testified that when he returned to St. Louis the same evening the condition of the bridge sidewalks was no better than in the morning, and that there was from five to eight inches of slush at some places on the walks; that it was higher in some places than in others, as though it had been piled up or swept there. On Tuesday morning plaintiff noticed that the sidewalks were still in the same condition, while the center of the bridge was cleaner and in better condition than the day before. On the evening of said Tuesday plaintiff, accompanied by Gus Weiss, a fellow-workman, started to walk across the bridge from the east side, and seeing the sidewalks unfit to walk on, they walked on the center or roadway of the bridge. When they came within about a hundred yards of the west toll office they saw the roadway blocked with vehicles. A wagon came along and plaintiff got out of its way by stepping on the street car track on the north side of the bridge. Then came a buggy, driven along said street car track, and to get out of its way plaintiff stepped over the guardrail between the sidewalk and

the driveway and placed his foot on the sidewalk, which was a little lower than the driveway. After reaching the sidewalk plaintiff took one or two steps, when his foot slipped on the slush and ice and he fell on his right hip and arm, the fall breaking his thigh bone at the hip joint. The time was about 5 p. m., and was about dusk. Plaintiff knew the condition of the sidewalk at the time, but as there were teams passing on the bridge he took his chances on the sidewalk rather than take chances in crossing the bridge to the south side ahead of the teams. Weiss raised plaintiff up and assisted him into a street car, which carried him to the west end of the bridge. He was taken to the dispensary at St. Louis, and from there home, where he was confined several months, after which he was able to get about on crutches. Plaintiff stated that he could walk a few steps without crutches, but could not stand it long, and used at least one crutch all the time. He said that on account of the injury he had been unable to do any work until about a year before the time of the trial, when he got a job, with the privilege of sitting down, his earnings being from fourteen to fifteen dollars every two weeks. Before the injury he was earning three dollars per day and was in good health. He did not know the exact amount he had paid for liniments and medicines, but thought it was about twenty-five dollars. The amount of the doctor's bill he did not know.

Plaintiff was treated by Dr. Hill, but as he was not progressing fast enough he called in Dr. Ross, who in his testimony stated that he called on plaintiff several weeks after the injury had occurred, and found evidences of fracture of the thigh bone at the hip joint. He only visited the plaintiff once or twice. For such visits he said his general charge was two dollars, but did not say that plaintiff had paid him.

Dr. Frank Ring testified that he examined plain-

tiff's condition with reference to the injury some three weeks before, and found evidence of fracture of the femur bone at the hip joint. He said plaintiff would always suffer pain in using the injured leg, and would never be able to walk without support.

Witness Gus Weiss, testifying for plaintiff, said that he crossed the bridge on Monday morning, December 9, when he found snow and ice on the bridge and sidewalks between four and five inches deep. Some places it was piled up. The snow had been swept from the street car tracks on to the sidewalks, and the pedestrians used the wagon road in crossing the bridge. On the evening of the same day the conditions were no better, nor on the following morning, December 10. His testimony was like that of plaintiff regarding the condition of the bridge and sidewalks and the circumstances preceding and attending the injury, differing slightly in the details.

The testimony adduced by defendant was to the effect that snow fell on December 8 to a depth of one and three-tenth inches; that it quit snowing at 5:20 p. m., same day, and that after it quit snowing defendant's foreman put eighty men, together with carts, to work to clean the snow off of the bridge, piling the snow and slush in piles on the north sidewalk, and they were still at work cleaning it off at the time of the accident (which was two full days after the snow fell), and there were yet many piles left on the north sidewalk to be carted away or thrown over the side of the bridge into the river.

Witness Mochett testified that he was at work sixty or seventy feet east from the place where plaintiff was injured cleaning up dirty little spots; that the mud from the driveway was being piled in piles on the north sidewalk, and the cart was there ready to haul it off; that as a rule the piles were only made from the ticket office to Third street (the west end of

the bridge), and to the east of the ticket office (the place where plaintiff received his injury), whatever was cleaned from the bridge was thrown into the river; that it sometimes took a half day and sometimes a day to clean the snow off, and they could go over one side easily in half a day, throwing the snow into the river. That the walk was rough from being worn.

Witness O'Neil testified that he was at work fifty or sixty feet east of plaintiff, scraping mud; that the piles were composed of snow and mud mixed. Witness saw no snow on the sidewalk that day except the piles of slush and mud; that the sidewalk was nine feet wide and only two or three feet next the guardrail was occupied by any piles of slush and mud; that the piles were composed of mud only so far as witness knew.

Witness Williams testified that in cleaning the bridge they always commenced on south side of driveway next to the guardrail and swept the roadway on to the north sidewalk and piled it all on the north sidewalk. That there were no restrictions as to where passengers should walk. That there were 3,168 fares collected on the bridge December 10, 1906.

At the close of all the evidence, defendant asked for an instruction in the nature of a demurrer to the evidence, which was refused by the court, and defendant duly excepted.

The first inquiry is as to whether the court erred in overruling the demurrer to the evidence.

Although defendant is not a common carrier, its obligation is to keep its bridge in a reasonably safe condition for travel, and it is only liable for negligence in failing to so keep it. The owner of the toll-bridge is not a common carrier, for in general he has no possession or control over the goods passing over it. He is not like a stage-owner or a railroad company. In these cases the passenger surrenders himself to the care and control of the stage-owner or railroad company,

or their agents and servants in charge of the stage or train upon which he is a passenger; but in crossing a toll bridge, the acts and conduct of a passenger are regulated by his own will. In *Grigsby v. Chappell*, 5 Rich. L. (S. C.) l. c. 445, it is said: "A bridge over a stream is but a continuation of the public highway which the owner, in consideration of certain tolls, undertakes to build and keep in repair. He is more like the owner of a turnpike road, and his liabilities are analogous. His obligation is to keep the bridge in proper condition for the safe passage of passengers. This is his duty, and if he omit it, he must answer for whatever loss others may sustain."

It is not claimed that the bridge was out of repair; but it appears from the evidence that a snow had fallen, and that next morning the snow on the street car tracks on the bridge was swept off and piled on the sidewalks of the bridge; so that besides the snow which had fallen on the sidewalks there was an accumulation thereon of the snow and slush swept from the street car tracks and driveway, and this was the condition when plaintiff crossed the bridge two days after the snow had fallen, except that some of the snow had melted and formed slush, part of which had turned into ice. When plaintiff started to cross the bridge on the evening he sustained the injury he kept to the driveway, which defendant had partially cleaned, and walked thereon until it was difficult, if not impossible, for him to proceed further on the driveway because of the blockade of vehicles near the toll collector's office. He turned to the right or north side of the bridge to avoid a team driven towards him, and was then compelled to step on the sidewalk to avoid a buggy driven in his direction. After getting on the sidewalk he made a step or two forward thereon when, on account of the ice and slush accumulated there, he slipped and fell, receiving the injuries stated.

The evidence offered by the defendant showed that 3,168 passengers crossed the bridge on the day plaintiff was injured, that the bridge was about 4,200 feet long, and that after it had quit snowing on December 8 defendant put eighty men to work cleaning off the snow. One witness stated that one side of the bridge could be easily cleaned in half a day; yet it would appear that the men were still at work cleaning off the snow and slush and piling it on the sidewalk at the time plaintiff was injured, which was two full days after the snow had fallen.

The effect of the demurrer was to admit as true all material facts shown by the evidence. This being so, did the facts and circumstances in evidence make out a *prima-facie* case and authorize the submission of it to the jury? It has been said that "persons, artificial or natural, who construct bridges and receive toll from those who use them are bound to use due care, skill and diligence to keep them in a reasonably safe condition for use by those who have a right to travel upon them. . . . While the owners of such a bridge are not warrantors or insurers, they are bound to exercise ordinary care to keep them in a reasonably safe condition for passage." [Elliott on Roads and Streets (2 Ed.), secs. 39, 40.]

While some of the adjudged cases hold that more than ordinary care is required of the owners of toll bridges, because they collect fares from those who use them, the authorities substantially agree that ordinary care is all the law requires, but to constitute ordinary care the care must be proportionate to the danger to be apprehended.

We are of the opinion that the question of plaintiff's contributory negligence, under the evidence as adduced, was one in regard to which reasonable minds might well differ, and was, therefore, properly submitted to the jury (*Berry v. Railroad*, 124 Mo. 223;

Powers v. Railroad, 202 Mo. 267) as well also as the question as to whether the bridge was reasonably safe for persons passing over it at the time of the accident.

Plaintiff's instructions numbered 1, 2, and 3 are claimed to be erroneous. They are as follows:

"1. If the jury find from the evidence that on the 10th day of December, 1901, the defendant was using and operating the bridge mentioned in the evidence for the purpose of carrying persons for hire over the Mississippi river; and if the jury find from the evidence that on said day the plaintiff was passing over said bridge and that he paid his fare for such passage; and if the jury find from the evidence that on said day there was accumulated on the sidewalk of said bridge provided by said defendant for its foot passengers to walk upon, ice and slush, and that whilst the plaintiff was so walking upon said bridge he stepped upon some ice and slush and was thereby caused to slip and fall and sustain injuries mentioned in the evidence; and if the jury find from the evidence that the defendant did not exercise ordinary care in so maintaining said sidewalk with said ice and slush thereon and in so permitting said ice and slush to be on said sidewalk; and if the jury believe from the evidence that the plaintiff was exercising ordinary care at the time of his injury, then plaintiff is entitled to recover.

"2. The court instructs the jury that by the term 'ordinary care' as applied to the defendant in the instructions, is meant such care as a prudent operator of a toll bridge would exercise under the same or similar circumstances, and as applied to the plaintiff is meant such care as a person of ordinary prudence would use under the same or similar circumstances.

"3. If the jury find for the plaintiff they should assess his damages at such a sum as they may believe from the evidence will be a fair pecuniary compensation to him.

"1st. For any pain of body or mind which the jury may believe from the evidence he has suffered or will hereafter suffer by reason of his injuries and directly caused thereby.

"2d. For any loss of the earnings of his labor and avocation which the jury may believe from the evidence he has sustained or will hereafter sustain by reason of his injuries and directly caused thereby.

"3d. For any expenses necessarily incurred by him for medicines, medical or surgical attention which the jury may believe from the evidence he has incurred by reason of said injuries and directly caused thereby."

Instruction number 1 is assailed upon the ground, as claimed, that it allowed the plaintiff to recover if he stepped upon ice and slush on the sidewalk of the bridge, without requiring the jury to first find that such ice and slush formed a dangerous obstruction to pedestrians in passing over said sidewalk. If this instruction had gone no further than the limit assigned to it by defendant, it would be subject to the objection urged against it, but the instruction goes further, and tells the jury that "if they find from the evidence that the defendant did not exercise ordinary care in so maintaining said sidewalk with said ice and slush thereon, and in so permitting said ice and slush to be on said sidewalk," etc., which shows that the objection is not well grounded. The instruction, as a whole, only required of the defendant the exercise of ordinary care in maintaining its sidewalk free from ice and slush. Besides, this identical point was covered by instruction numbered 1 given at the instance of defendant, and which told the jury that in order to recover, "the plaintiff must prove by a preponderance of the evidence: 1st, that the plaintiff slipped and fell on account of ice or slush that had accumulated on the sidewalk of said bridge; 2d, that the defendant, in allowing

said ice and slush to so accumulate on said sidewalk, was guilty of negligence; 3d, that said ice or slush was a dangerous obstruction to pedestrians passing over said sidewalk on said bridge. And even then, the plaintiff is not entitled to recover if you further find from the evidence that the injuries complained of by plaintiff were in anywise directly due to any want of ordinary care on his part, or that said injuries could have been avoided by the exercise of ordinary care on the part of plaintiff."

These instructions are not conflicting, but are in perfect harmony with each other. Even conceding (which we by no means do) that plaintiff's instructions only cover part of the case, any omission therein was supplied by those given at defendant's instance. An ambiguous or general term in one instruction may be explained by another instruction, and a partial view may also thus be supplemented, provided the whole be consistent and harmonious. [Goetz v. Railroad, 50 Mo. 472; Chambers v. Chester, 172 Mo. 461; Liese v. Meyer, 143 Mo. 547.]

Plaintiff's instruction numbered 2 is challenged upon the ground that it is misleading in that it leaves the jury to grope in darkness as to what degree of care should be exercised by the defendant; that while it tells the jury that defendant should exercise such care as a prudent operator of a toll bridge would exercise under the same or similar circumstances, it does not throw any light upon the subject as to what degree of care a toll bridge operator does or should exercise, and that it is further defective in its wording and draws an improper distinction between the degree of care incumbent on the plaintiff and that incumbent on the defendant.

It is conceded by defendant that the definition of ordinary care as applied to plaintiff is correctly given, when it is stated that it is such care as a person of

ordinary prudence would use under the same or similar circumstances, but it is insisted that the term "ordinary care" as applied to the defendant was erroneously defined by the court as such care as a prudent operator of a toll bridge would exercise. While the instruction is unhappily worded, in that it uses the words "such care as a prudent operator of a toll bridge would exercise," instead of the words "such care as a person of ordinary prudence would exercise," we do not think it misleading or confusing, as both expressions mean practically the same thing. Therefore, the judgment should not be reversed upon this ground alone.

It is insisted that plaintiff's instruction numbered 3 is erroneous in that it told the jury that plaintiff was entitled to recover damages "for any expenses necessarily incurred by him for medicines, medical or surgical attention which the jury may believe from the evidence he has incurred by reason of said injuries and directly caused thereby," the objection being that there was no evidence upon which to base this part of the instruction.

Upon a careful examination of the record, we have failed to find any evidence which would authorize the giving of such instruction. But two physicians ever said that they called on plaintiff in a professional capacity after his injury. One of them called on him once or twice, but did not state that he received any compensation for his services. His only statement in that regard was that he generally charged two dollars a visit. Nor is there any evidence that plaintiff ever paid him anything for his services. Dr. Ring, the other physician, examined the plaintiff twice merely for the purpose of testifying as an expert in the case, and neither party to the suit asked him about the liability, if any, incurred by plaintiff on account of his services, or the reasonable value thereof; nor did he

make any statement in that regard. Plaintiff, upon this question, testified that he did not know the amount of the doctors' bills. It will be noted that the instruction told the jury that if they found for plaintiff they would allow him "for any expenses necessarily incurred by him for medicines, medical or surgical attention," etc., thus leaving the jury to estimate the damages that ought to be allowed on account of expenses incurred for medical and surgical attention without any evidence to enlighten them or any bases upon which to form such estimate. Damages of this character cannot be allowed except upon proof. [Duke v. Railroad, 99 Mo. 349; Smith v. Railroad, 108 Mo. 243; Morris v. Railroad, 144 Mo. 500; Robertson v. Railroad, 152 Mo. 382.] In Nelson v. Railroad, 113 Mo. App. l. c. 663, it is said: "Proof of the liability paid or incurred is some evidence of the value of the services (Abbitt v. Railroad, 104 Mo. App. 534), but when, as in this case, the evidence fails to show either the amount of the charge or the reasonable value of the services, there is an entire failure of proof, and the jury should not be permitted to speculate in an effort to award full compensation for the actual damages suffered. Nor can it be said that the error was harmless. The verdict greatly exceeded the sum of the actual disbursements made by plaintiff. We are unable to know just how much of the excess represents damages of this character, but, presumably, the jury obeyed the instruction and allowed something for them. Under the pleadings and evidence it was error to direct this to be done."

For the error noted the judgment is reversed and the cause remanded. All concur.

CITY OF ST. LOUIS, Plaintiff in Error, v.
LANGELAND.

Division Two, April 2, 1907.

PUBLIC HEALTH: Milk: Constitutional Ordinance. A city ordinance which imposes a fine on any person who sells or exposes for sale "milk containing less than three per cent by weight of butter-fat, and 8.5 per cent of solids not fat, and seven-tenths of one per cent ash, of which fifty per cent is insoluble in hot water," does not violate any of the constitutional rights of the citizen.

Error to St. Louis Court of Criminal Correction.—
Hon. Hiram N. Moore, Judge.

REVERSED (*with directions*).

Chas. W. Bates and Chas. P. Williams for plaintiff in error.

GANTT, J.—This is an action by the city of St. Louis against the defendant for the violation of an ordinance of said city, entitled, 'An ordinance to license and regulate the sale of milk and cream, and to provide for the inspection thereof,' this ordinance being numbered 20,808, section 18, approved August 27, 1902. The information charges that the defendant on the 5th day of February, 1903, in the city of St. Louis at Kings Highway and Natural Bridge Road, did sell, keep for sale and expose for sale at said time and place, milk containing less than three per cent by weight of butter-fat, and 8.5 per cent of solids not fat, and seven-tenths of one per cent ash, of which fifty per cent was insoluble in hot water, contrary to the ordinance aforesaid.

The defendant moved in the St. Louis Court of Criminal Correction to quash the complaint and dismiss the action on sixteen grounds, which motion the court sustained and dismissed the suit, to which action of the court the plaintiff then and there, at the time duly excepted, and has in due time brought the matter to this court by writ of error.

I. All the constitutional questions relied upon in the motion to quash the information in the court of criminal correction, were disposed of adversely to the contention of the defendant in the cases of *St. Louis v. Liessing*, 190 Mo. 464, and the kindred cases of the *City of St. Louis v. Grafeman Dairy Company*, 190 Mo. 492; *City of St. Louis v. Schuler*, 190 Mo. 524; *City of St. Louis v. Polinsky*, 190 Mo. 516; *City of St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507.

II. The information was sufficient and the court erred in dismissing the cause. [*St. Louis v. Bippen*, 201 Mo. 528.]

Judgment reversed with directions to the St. Louis Court of Criminal Correction to reinstate the cause and grant a new trial and proceed in accordance with the views herein expressed.

Fox, P. J., and Burgess, J., concur.

CHARLES E. KOONS v. ST. LOUIS CAR COMPANY, Appellant.

Division Two, April 2, 1907.

1. **SUIT ON CONTRACT: Recovery on Another.** Where plaintiff sues on a special contract he must recover on that contract or not at all. Plaintiff alleged that defendant employed him to do certain painting at certain prices, he to furnish all the materials, and that he agreed to take all the materials defendant had on hand at the time he began the work at their reasonable market value, and defendant agreed to take back at their reasonable market value all the materials he had on hand at the time his employment ceased, and the petition is silent as to whether the contract was written or oral, but to prove his case he offered in evidence a written contract which contained no reference to the purchase of materials either at the beginning or completion of the work. *Held*, that, having elected to stand on the written contract, he cannot recover on a contract, part of which was written and part oral.
2. ———: **Part Oral and Part Written.** Plaintiff contends that the original contract was verbal and entire and a part only was reduced to writing, and for that reason the rule that parol contemporaneous evidence cannot be introduced to vary the terms of the written instrument does not apply. *Held*, that the contention cannot be upheld in this case, for three reasons: *first*, such a contract must be pleaded, which was not done; *second*, the rule never applies except where the part of the contract which is reduced to writing shows upon its face that it is incomplete and that it does not purport to be a complete expression of the agreement; and, *third*, the plaintiff repeatedly stated in his testimony that the verbal contract was not made until after the written contract was executed.
3. ———: **Alteration.** A material alteration by plaintiff of his copy of the written contract made in duplicate nullified the contract, and the whole contract is void when suit is instituted on the altered part.
4. ———: ———: **Validity Admitted in Answer: Knowledge.** An admission in the answer made upon a misapprehension of the facts is not admissible in evidence to make out plaintiff's case. An admission of the validity of the contract sued on, without knowledge that it had been altered, does not breathe new life into the contract rendered void by the alteration, and does not constitute an admission of the facts stated in the petition.

5. ———: ———: **Fraudulent Intent.** A material alteration of a written contract, even though done with no fraudulent intent, but in good faith in order to make it conform to the real agreement between the parties, nullifies the contract.
6. ———: **Modified by Parol: Pleading.** Parties to a written contract may by a subsequent oral agreement upon a sufficient consideration change or modify it; but plaintiff cannot plead the original contract and recover on the modified contract. In a suit based upon the modified contract, that contract must be distinctly pleaded. It is not competent by general allegations in the petition to blend the provisions of the written and parol contracts as if the suit were based on one written contract.
7. ———: **Quantum Meruit.** A suit which is clearly one on contract, as shown by both the petition and evidence, cannot be considered one of *quantum meruit*.

Appeal from St. Louis City Circuit Court.—*Hon. Robert M. Foster*, Judge.

REVERSED AND REMANDED.

Lehmann & Lehmann and *Joseph W. Jamison* for appellant.

(1) Plaintiff sued on a special contract and he must recover upon the contract or not at all. This is the rule although the evidence develops a cause of action for money had and received or a *quantum meruit* for work and labor done and services performed, or some other good cause of action. In such case evidence of the reasonable value of the services performed should be excluded. *Cole v. Armour*, 154 Mo. 333. And plaintiff cannot sue upon one cause of action and recover upon another. *Clements v. Yeats*, 69 Mo. 623; *Smith v. Shell*, 82 Mo. 215; *Feurth v. Anderson*, 87 Mo. 354; *Whippell v. B. & L. Assn.*, 55 Mo. App. 554.

(2) The change made by plaintiff on the face of his contract was a nullifying alteration. *Kelly v. Thuey*, 143 Mo. 422; *Bank v. Umrath*, 42 Mo. App. 529; *Hord v. Taubman*, 79 Mo. 101; *Evans v. Forman*, 60 Mo. 449; *Bank v. Armstrong*, 62 Mo. 59; *Bank v. Dunn*, 62 Mo.

79. (3) Where, as in the present case, a contract is signed in duplicate, each of the parties retaining a copy, and one of the parties without the knowledge or consent of the other changes by alteration and then brings suit on the copy retained by him, defendant may defeat a recovery by the defense of *non est factum*; and this is true although defendant offers his unaltered duplicate in evidence. *Mfg. Co. v. Hudson*, 113 Mo. App. 344. (4) The writing being complete on its face, parol evidence was inadmissible to contradict or vary its terms. *Parker v. Vanhoozer*, 142 Mo. 627; *McClurg v. Whitney*, 82 Mo. App. 625; *Local Con. Co. v. Tie Co.*, 185 Mo. 25; *Harrington v. Brocman Com. Co.*, 107 Mo. App. 418; *Howard v. Scott*, 98 Mo. App. 509; *Tufts v. Morris*, 87 Mo. App. 98; *Newbury v. Durand*, 87 Mo. App. 290. (5) Parol evidence was inadmissible for the purpose of incorporating into the written instrument any alleged contemporaneous agreement. *Walker v. Engler*, 30 Mo. 130; *Tracey v. Union Iron Works*, 104 Mo. 193; *Savings Bank v. Cushman*, 66 Mo. App. 102; *Loan & Trust Co. v. Whitman*, 71 Mo. App. 275. (6) Where one seeks to enforce a contract, whether in writing or resting in parol, which has been modified by a subsequent agreement, he must declare upon the agreement as modified. *Hennings v. Ins. Co.*, 47 Mo. 425; *Lanitz v. King*, 93 Mo. 513. The proper pleading in such case is to declare on the contract by setting out the agreement as first made and then the modification, since each is a substantive fact. *Harrison v. Railroad*, 50 Mo. App. 332; *Halpin v. School Dist.*, 54 Mo. App. 371; *Ebers v. Schumacher*, 57 Mo. App. 451. (7) Plaintiff identified his altered duplicate as being the contract declared upon in his petition. His counsel offered the whole of the contract in evidence and thereby claimed under the alterations which plaintiff had fraudulently interlined therein. Plaintiff was bound by this offer, and by claiming

rights by virtue of the alterations he avoided the contract. *Bank v. Fricke*, 75 Mo. 178; *Bank v. Umrath*, 42 Mo. App. 529. Where counsel state or admit facts, the existence of which precludes a recovery by their clients, the court may close the case at once and give judgment against their clients. *Pratt v. Conway*, 148 Mo. 291; *Fillingham v. Railroad*, 102 Mo. App. 573; *Walsh v. Railroad*, 102 Mo. 588; *Butler v. National Home*, 144 U. S. 65; *State v. O'Neill*, 151 Mo. 67. (8) Admissions or declarations made in ignorance of or under a misapprehension of the true facts do not estop the person making them from asserting the truth. *Stagel v. Bldg. Co.*, 81 Mo. App. 620; *Nichols v. Jones*, 32 Mo. App. 657. As shown both by rulings made throughout the trial and the findings, great importance was attached by the referee to the admission found in the pleadings to the effect that defendant had employed plaintiff as was alleged in plaintiff's petition.

Lyon & Swarts for respondent.

(1) The admission in defendant's original answer, "that the plaintiff was employed by defendant as alleged in his petition," was sufficient to dispense with the necessity, otherwise, of offering any other proof of the contract. *Drug Co. v. Bybee*, 179 Mo. 366; *Walser v. Wear*, 141 Mo. 463; *Cross v. Railroad*, 141 Mo. 144; *Spurlock v. Railroad*, 125 Mo. 407; *Schad v. Sharp*, 95 Mo. 576; *Price v. Clevenger*, 99 Mo. App. 540; *Mahan v. Brinnell*, 94 Mo. App. 171; *Bushnell v. Ins. Co.*, 91 Mo. App. 528. Defendant's amended answer in no wise lessened the effect of defendant's admission in its original answer, and amounted to nothing more or less than a general denial. *Meyer v. Broadwell*, 83 Mo. 574. (2) The original contract was verbal and a part only was reduced to writing. Parol evidence was, therefore, admissible to show any dis-

tinct collateral agreement, independent of, and not varying, the written agreement. Parol evidence is also admissible where the writing itself is subsequently varied by a parol agreement. *Roe v. Bank*, 167 Mo. 427; *State v. Cunningham*, 154 Mo. 172; *Greening v. Steele*, 122 Mo. 294; *Lumber Co. v. Warner*, 93 Mo. 384; *Brown v. Bowen*, 90 Mo. 189; *Ellis v. Bray*, 79 Mo. 238; *O'Neil v. Crain*, 67 Mo. 251; *Life Assn. v. Cravens*, 60 Mo. 390; *Van Studdiford v. Hazlett*, 56 Mo. 324; *Letcher v. Letcher*, 50 Mo. 138. (a) Plaintiff's petition does not charge that the contract of employment was in writing, and in view of defendant's insistence that unauthorized alterations by plaintiff in his duplicate of the written portion of the contract entirely vitiated such duplicate and in fact the whole of the written evidence of any portion of the contract, then on such theory of the case the entire agreement must be deemed to be thrown into parol. *Boyd v. Camp*, 31 Mo. 165. (b) Inasmuch as certain omissions in the written portion of the agreement were conceded to exist by defendant before plaintiff began his employment and the supplying of these omissions was demanded by plaintiff and acceded to by defendant before plaintiff began his employment, parol evidence of what the employment actually was in its entirety was admissible. *Warren v. Mfg. Co.*, 161 Mo. 121; *State v. Cunningham*, 154 Mo. 172. (3) Defendant's unaltered duplicate of the written portion of the agreement was admissible in evidence, even though the referee was justified in excluding, upon defendant's objection, plaintiff's altered duplicate. *Jones v. Hoard*, 59 Ark. 46; *Young v. Cohen*, 42 S. C. 328. Defendant is bound, however, by its voluntary introduction of its unaltered duplicate in evidence in its cross-examination of plaintiff. *Dice v. Hamilton*, 178 Mo. 90. Defendant is also bound by the testimony elicited by it with reference to the alterations made in plaintiff's

duplicate, whereby what are erroneously termed "modifications" of the written portion of the agreement were shown to be merely intended to supply conceded omissions therein. *Sutter v. Raeder*, 149 Mo. 309; *Railroad v. Plate*, 92 Mo. 635. (4) If, under the cases below cited, the petition in this case may be held to be a petition on *quantum meruit*, then all objections of defendant to the recovery herein are of no avail. *Warder v. Seitz*, 157 Mo. 149; *Glover v. Henderson*, 120 Mo. 376. (5) The judgment is for the right party, on whatever theory or from whatever viewpoint the case may be looked at, and it will not, therefore, be disturbed. *Redman v. Adams*, 165 Mo. 70.

FOX, P. J.—This is an action upon contract, seeking to recover the contract price for painting cars, lettering signs, and the value of a certain stock of paints, oils, varnishes and painters' tools, done and furnished by plaintiff for the defendant. The suit was brought in the circuit court of the city of St. Louis, and the amount claimed was \$7,370.02, with six per cent interest from January 1, 1899.

The main questions involved regard the pleadings and the admissibility of the evidence thereunder, and, in order to properly understand those questions, it will be necessary to set out the pleadings. Omitting the formal parts, the petition is as follows:

"The plaintiff states that at all the times herein-after mentioned the defendant was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri and having its principal office and place of business in the city of St. Louis, in the State of Missouri.

"For his cause of action herein the plaintiff states that heretofore, to-wit, on or about the 21st day of January, 1898, he was employed by the defendant to paint cars for the defendant and to do such other paint-

ing as he might from time to time be ordered and directed by the defendant to do. That the defendant agreed to pay the plaintiff for said work as follows: Four dollars and fifty cents per running foot, measuring over corner posts, for painting standard cars with open dashes, whether trail or motor car; four dollars and seventy-five cents per running foot, measuring over corner posts, for painting standard closed cars with open cab at each end; five dollars per running foot, measuring over corner posts, for painting cars with steam coach roof and closed cab at each end; three dollars per running foot, measuring over corner posts, for painting open cars of all styles; the reasonable value of painting and lettering signs; also one dollar and fifty cents per car for furnishing the necessary tools for doing the aforesaid work; also the reasonable value of all other painting which the defendant might order and direct the plaintiff to do; the plaintiff agreeing to furnish all material necessary to do the work of painting cars as aforesaid.

“That it was further agreed between the plaintiff and the defendant that the plaintiff should furnish the car builders of the defendant with lead and oil, for car building purposes only, and that the defendant agreed and promised to pay the plaintiff the reasonable cost price thereof. That it was further agreed between the plaintiff and the defendant that the stock of paints and paint materials and miscellaneous painters’ tools, owned by the defendant and on hand at the time the plaintiff begins his said employment with the defendant, should be turned over to the plaintiff as his property and charged against the plaintiff at the reasonable market value thereof, and that at the termination of the plaintiff’s said employment with the defendant, the stock of paints and paint materials and miscellaneous painters’ tools, then on hand and owned by the plaintiff, should be turned over to the defendant as

its property and be credited in favor of the plaintiff against the defendant on account of the plaintiff's said employment at the then reasonable market value thereof. The plaintiff further states that in pursuance of the terms of his said employment by the defendant, the plaintiff did, between the 3d day of February, 1898, and the 31st day of December, 1898, both inclusive, paint cars for the defendant, paint and letter signs for the defendant, perform other painting work at the special instance and request of the defendant, furnish the necessary tools for doing the aforesaid work, furnish all material necessary to do said work, and furnish the defendant's car builders with lead and oil for car building purposes, all of which is more particularly set forth in the statement of account herewith filed and marked "Exhibit A," in which said statement of account are also set forth the prices charged as agreed upon as aforesaid, all of which are and were reasonable and just, and which the defendant promised and agreed to pay to the plaintiff, and also the reasonable market value of the stock of paints and paint materials and miscellaneous painters' tools turned over to the plaintiff by the defendant at the time the plaintiff began his said employment with the defendant, to-wit, on the 3d day of February, 1898, and also the reasonable market value of the same on hand and turned over by the plaintiff to the defendant at the termination of the plaintiff's said employment with the defendant, to-wit, on the 31st day of December, 1898.

"The plaintiff further states that on the 31st day of December, 1898, the defendant terminated the plaintiff's said employment and received from the plaintiff the plaintiff's stock of paints and paint materials and miscellaneous painters' tools, then on hand, and of the reasonable market value of six thousand, nine hundred and two dollars and thirty-eight cents.

"The plaintiff further states that by reason of the

premises aforesaid the defendant is justly indebted to the plaintiff in the sum of seven thousand three hundred and seventy dollars and two cents, being the balance due and owing by the defendant to the plaintiff on account of his said employment; that said sum was due and payable to the plaintiff on the first day of January, 1899, although frequently demanded by the plaintiff from the defendant since said first day of January, 1899, inclusive, the defendant has failed and refused, and still fails and refuses, to pay the same or any part thereof.

"Wherefore, the plaintiff prays judgment against the defendant for said sum of seven thousand three hundred and seventy dollars and two cents with interest from the first day of January, 1899, at the rate of six per cent. per annum, and costs."

Thereafter, on February 18, 1903, defendant by leave of court filed its answer to plaintiff's petition, which answer, omitting caption and signatures, is in words and figures as follows:

"Defendant for its answer to the petition admits that it was a corporation; admits that the plaintiff was employed by defendant as alleged in his petition; admits that said plaintiff performed some work for defendant as a painter, and declares that the same has since been paid for by defendant in money and in material furnished by defendant to plaintiff; but this defendant denies that it received from plaintiff on the 31st day of December, 1898, or at any other time, paints, paint materials and painters' tools to the amount of the value of \$6,902.38 as alleged in the petition; and denies that plaintiff in his petition gives proper credit to defendant, and denies each and every other allegation in plaintiff's petition contained.

"Further answering, defendant says that the trial of the issues herein will involve the taking and examination of long and complicated accounts between the

parties, and therefore asks the court to appoint some competent person as referee herein."

By stipulation of the parties, filed, the court, on February 21, 1903, appointed Walter D. Coles, Esq., referee, in said cause, and directed him to try all the issues in the case and report his decision to the court with all convenient speed. The referee, after qualifying, and in pursuance to notice given the parties, began the taking of testimony in the cause on March 10, 1903, and the hearing was continued from time to time until October 16, 1903, on which day he filed his written report and finding, together with all exhibits and a transcript of the evidence, with the clerk of said court.

After a great mass of evidence had been taken by the referee, Charles Koons, the plaintiff, was placed upon the witness stand, and he testified, in substance, as follows: "I am the plaintiff. I was employed by the defendant, and began work in January, 1898, according to my contract. The contract was in writing and was signed in duplicate, and dated St. Louis, January 21, 1898. I took one, and the defendant retained the other." The witness was then shown the copy of the contract taken by him, and identified his and defendant's signatures thereto.

Mr. Lyon, for plaintiff, then offered the identified copy in evidence, which was objected to until the witness could be cross-examined regarding its execution. The objection was sustained, and Mr. Crawley, for defendant, examined him, and he testified as follows: "The contract was prepared in the office of the St. Louis Car Company. I was present, and Mr. Kobusch dictated it." The witness first testified that the copy identified was an exact copy of the one retained by defendant, but later testified that without the knowledge or consent of the defendant, he, with pen and ink, interlined his copy by writing therein the words italicized and embraced within brackets as they appear in

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the contract, which, after the interlineations were made, reads as follows:

“St. Louis, January 21, 1898.

“I hereby agree to paint cars for the St. Louis Car Company as follows:

“Twenty-foot, standard car with open dashes, trail or motor car, \$4.50 per running foot, measuring over corner posts.

“Standard closed car with open cab at each end, \$4.75 per running foot, measuring over corner posts.

“Car with steam coach roof, closed cab at each end, \$5 per running foot, measuring over corner posts.

“All styles of open cars at \$3 per running foot, measuring over corner posts.

“The above prices include the painting of gates, guards, and all other details that may be attached to the car, in other words, everything with the exception of roof signs. If any signs are to be furnished the painting and letters are to be paid for extra. The additional price for signs to be as low as is consistent with first-class work.

“I guarantee to do all work in a strictly first-class manner and use nothing but first-class material. All outside work to be finished with Noble & Hoar’s varnish [*unless otherwise specified*]. All inside work to be finished with first-class varnish. I will furnish all material necessary to do the work. The St. Louis Car Company to furnish shop room [*mills and machinery*] and do all moving of car bodies, trussels [*etc., to make it convenient*]. In addition to the above I also agree to furnish the necessary tools for doing the work for which I am to receive \$1.50 per car additional to above prices.

Respectfully submitted,

“CHAS. E. KOONS.

“Accepted,

“St. Louis Car Company,

“per GEORGE J. KOBUSCH.”

There was evidence tending to show the contract between the plaintiff and defendant was modified according to the terms as stated by the interlineations, but there was no evidence tending to show that defendant agreed to the interlineations or changes made by plaintiff in the contract, or that it ever heard of the changes until the contract was offered in evidence.

After many unsuccessful attempts to introduce the altered contract in evidence, the counsel for plaintiff said: "I think I can cut this very short by asking them to produce their duplicate and I can rely upon that as this is *not a suit on contract*; that the employment of the plaintiff on or about January 21, 1898, was under oral agreement, made between the plaintiff and George J. Kobusch, the president of the defendant company, on behalf of the defendant; that a part of this is oral agreement in so far as the employment related to the price which the plaintiff was to receive for the painting of cars and for the furnishing of tools for doing this work was *reduced to writing, and the remainder was oral*. I state that now so that our position will be fully defined. I will withdraw this paper and ask you to produce the duplicate that you have."

After requesting defendant's counsel several times to produce the duplicate, the plaintiff's counsel, Mr. Lyon, said: "I ask that defendant be required to produce the written copy, dated January 1, 1898, and entered into between plaintiff and defendant."

Referee: "You will have to show he has it."

Mr. Crawley: "I tell you very plainly I will not do it" (meaning he would not produce defendant's copy).

Mr. Lyon: "Well, I will file a petition then requiring the production."

Mr. Crawley: "We resist the application."

Mr. Lyon: "I have thought over the matter and I will re-offer the paper identified as 'Exhibit F.' I

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will re-offer that in evidence"—which is the altered copy.

Defendant objected for various reasons.

Mr. Lyon: "I will say this is a *written contract* and I say they have the right to cross-examine later as to whether it is or not. . . . It is a *written agreement* and if these *interlineations* were made there without the authority of the defendant company and were not part of the agreement between the parties, then I say that they can be *ignored, discarded and disregarded.*"

The Referee: "Well, let us go further than that and suppose that these interlineations and changes embodied what the parties subsequently agreed upon verbally, do you think one of the parties is entitled to incorporate them into the written contract and then offer it as a written contract?"

Mr. Lyon: "I don't think so, no, except that the witness stated that he was told to make a note of it. Now, I, myself, never heard of these interlineations being made subsequent to the execution of this paper by Mr. Kobusch, but if Mr. Kobusch told him to make a note of it and he immediately went to this desk and made a note of it as he understood it without any fraudulent intent, there must be fraudulent intent now."

The Referee: "The objection is sustained."

On March 25, 1903, Mr. Crawley stated to the referee he had been served with "a notice to produce a certain contract or agreement in writing between plaintiff and defendant, dated January 21, 1898, and relating to the painting of cars by the plaintiff for defendant. I now hand the paper in question to counsel for plaintiff."

Mr. Lyon: "I desire to state at this time that while I do not think it is really necessary to do so at this time, but so as to avoid misapprehension, that

plaintiff's petition in this case is based upon an open account; that the employment of the plaintiff on or about January 21, 1898, was under an oral agreement made between the plaintiff and George J. Kobusch, the president of the defendant company, on behalf of the defendant; that a part of this agreement, in so far as the employment related to the price which the plaintiff was to receive for the painting of cars and for the furnishing of tools for doing this work, was reduced to writing, and the remainder was oral. I state that now so that our position will be fully defined."

The Referee: "As I interpret the plaintiff's petition it is not necessarily founded upon a written contract. I think the only available objection growing out of the evidence as it now stands before the referee is the question of law as to whether the plaintiff can recover at all upon the theory of contract, and whether this contract should be considered as a *verbal or a written contract*. In other words, whether, if the plaintiff has got any right to recover, he wouldn't be obliged to resort to an *implied contract or sue upon quantum meruit*, not being able to recover upon a contract which he has altered in a material respect without authorization of the other party."

Mr. Lyon: "The written instrument is not in evidence. . . . We are proceeding upon the *agreement made orally* between the plaintiff and the defendant for the painting of cars by the plaintiff for the defendant, and such other painting as the plaintiff, from time to time, might be ordered and directed by the defendant to do."

Mr. Crawley: "The defendant at this point states to the referee that it is not prepared to continue the trial of this cause at this time, or to proceed further herein at this time, for the reason that said defendant is surprised and taken at a total disadvantage by the rulings of the referee upon the objections just made

by defendant to the offering and proposal of plaintiff to prove a contract between the parties partly written and partly oral.

"Second. Because the defendant is taken at a disadvantage and is surprised and is utterly unprepared to try this case at this time, for the further reason that there is nothing in plaintiff's petition to indicate that plaintiff relied upon or sued upon any other contract or agreement than the one of January 21, 1898, which contract, as shown by the evidence before the referee, was executed in duplicate, one copy of it being retained by plaintiff, the other by defendant.

"Third. Because, at the time of preparing defendant's answer in this case defendant was led to believe and did believe, from plaintiff's petition, that the agreement or contract referred to in said petition as the foundation of the action was the written contract as executed in duplicate, dated January 21, 1898.

"Fourth. Because defendant ascertained on yesterday, for the first time, that the contract of January 21, 1898, was annulled and destroyed, in fact and in law, before the institution of this suit, by the act of plaintiff himself in making certain alterations therein without the knowledge or consent of this defendant.

"Fifth. Because the answer of defendant was prepared and filed in the belief that the contract referred to in the petition, namely, the one of January 21, 1898, was the one upon which plaintiff relied in this case, and that the answer of defendant was prepared and filed in that belief, and no other; because defendant is not prepared at this time to join issue upon another and different contract, and cannot do so, or avail itself of the new fact which has been disclosed by plaintiff's testimony without obtaining leave from the circuit

court in which this suit is pending to file an amended answer herein.

"Sixth. Because it is the purpose and intention of this defendant to, apply, as soon as possible, to the circuit court in which this suit is pending for leave to file an amended answer herein, which amended answer is rendered absolutely necessary by the rulings of your honor that evidence may be heard under the proposal or offer of plaintiff to prove a contract partly written and partly oral.

"For these reasons we ask your Honor to allow us such time as you may think reasonable to prepare and present to your Honor the affidavit of surprise herein."

The Referee: "The referee does not consider that any of the matters stated by counsel would constitute legal surprise, or present any reason why the referee should properly, in the exercise of sound discretion, grant a continuance, except the statement of counsel that they believe the issues to be presented to be different from those that have been presented. In view of that statement of counsel, and the further statement that the evidence makes it necessary, in their opinion, to file an amended answer, I propose to give the defendant reasonable time to do so without the necessity of filing an affidavit."

On Friday, April 10, 1903, at 2 p. m., the hearing in this matter was resumed before the referee, and the respective parties being present, the following proceedings were had:

Mr. Jamison: "I desire now, if your Honor please, upon reconvening at this hour, to object to the introduction of any further evidence in this case because since the last adjournment defendant presented an application to the circuit court for permission to file an amended answer in this case, and because the court passed upon that application and granted defendant such leave, and the defendant has filed an amended an-

swer since the last adjournment, wherein, aside from general denial to the allegations in plaintiff's petition they also plead *non est factum* as to the contract declared upon in plaintiff's petition. The court in passing upon that matter, having adjudicated, as a matter of fact, that plaintiff's petition was based upon a written contract, and that written contract having been excluded by the court because of material and unauthorized alterations, the plaintiff is not entitled to proceed any further with this trial."

The Referee: "Well, that objection will be overruled, because there is nothing before me now." Defendant excepts.

Mr. Jamison: "I now desire to renew and re-state the objections to any further evidence being offered in this case on the same grounds that were stated by defendant's counsel just before the adjournment ordered by the referee in order to permit defendant to present an application to file an amended answer. These objections are numbered in the transcript prepared by the stenographer, beginning on page 161, from 1 to 9 inclusive; I desire now to restate and have the stenographer recopy them at this point, as our objections to the introduction of any further evidence in this case."

The Referee: "The objection is overruled." Defendant excepts.

The following is a copy of the objections referred to by counsel:

Mr. Crawley: "I object to the introduction of any further testimony under the pleadings as they now stand for the following reasons:

"First: Because the petition in this case alleges that the work and materials in respect of which this action was brought was done and furnished under an agreement made and entered into on or about the 21st day of January, 1898.

"Second: Because the plaintiff, under that peti-

tion, and to sustain the issues assigned on his part, produced here before your Honor on yesterday a written contract containing certain interlineations made by him, which contract as interlined said plaintiff solemnly declared was the contract under which the work was done and the materials delivered, as alleged in his petition.

“Third: Because, it appeared in the testimony of the plaintiff yesterday that the contract of January 21, 1898, upon which the petition in this case is based, was wrongfully interlined and altered by plaintiff in the absence of the defendant, and without the authority of the defendant, and without the knowledge or authority of any person or officer authorized to act for the defendant in that behalf, and because of said interlineations said contract of January 21, 1898, was destroyed and rendered null and void.

“Fourth: Because defendant and its attorneys had no knowledge or information of said alterations until the same were testified to by the plaintiff.

“Fifth: Because the proposed change from the written contract as pleaded in the petition, and as produced by plaintiff in evidence, to a verbal contract different from the written contract pleaded, ought not to be, and cannot be allowed at this stage of the action.

“Sixth: Because the plaintiff has no right to sue under a written contract and to abandon the written contract at the trial to recover on an alleged verbal contract.

“Seventh: Because the contract referred to in the petition is a written contract, as shown by the testimony of plaintiff himself.

“Eighth: Because the paper so identified by plaintiff was offered in evidence by plaintiff’s counsel yesterday in support of the issues on the part of said plaintiff and cannot now be abandoned.

"Ninth: Because there is no allegation in the petition that the contract there sued on consists in part of a writing and in part of a subsequent verbal modification, and because any such modifications, if verbally made after the execution of the writing, must have been incorporated by appropriate allegations into the petition; and if said alleged verbal agreements were made before or contemporaneously with the writing no evidence concerning them can be received because they are merged, as a matter of law, into the written contract."

The defendant's said amended answer, filed, is as follows, formal parts omitted:

"Defendant for amended answer to plaintiff's petition, leave of court to file the same being first had and obtained, denies each and every allegation and averment in said petition contained.

"For further answer to said petition defendant states that its contract for the employment of plaintiff to do painting for defendant and to furnish certain paints and paint materials was in writing and was made and entered into by and between plaintiff and defendant on the twenty-first day of January, 1898. That a copy of said written contract so made and entered into is herewith filed, made a part hereof and marked 'Exhibit A.'

"Defendant further answering states that plaintiff thereafter, without the knowledge or consent of defendant or any of its officers, wrongfully, fraudulently and materially changed and altered said written contract by inserting and interlining therein in the 18th line between the word 'varnish' and the word 'all' the words, 'unless otherwise specified,' and by inserting and writing therein between the word 'room' and the word 'and' in the twentieth line, the words, 'mills and machinery,' and by further inserting and interlining in said writing after the word trussels, it being the

last word in the twenty-fifth line, the words, 'etc., to make it convenient,' and by further writing on said paper after the signature of George K. Kobusch certain addenda, the precise language of which defendant is unable to state."

Thereafter, to-wit, on April 4, 1903, plaintiff filed his reply to said amended answer, which reply, omitting caption and signatures, is in words as follows:

"Now comes the plaintiff and for his reply to the amended answer of defendant, denies each and every allegation therein contained.

"Wherefore, plaintiff again prays judgment as in his petition prayed."

The plaintiff then offered parol evidence tending to prove all the allegations of the petition, which was duly objected to by the defendant, and was by the court overruled, and defendant duly excepted.

The plaintiff then rested his case, and defendant offered a demurrer to the evidence, which was by the court overruled, and defendant excepted.

Defendant offered in evidence a notice, served on it by the plaintiff during the progress of the trial, to produce and file in the case, on March 25, 1903, the duplicate copy of the contract between plaintiff and defendant, dated January 21, 1898, which, omitting formal parts, is as follows:

"You are hereby notified to produce on the trial of the above-entitled cause before Honorable Walter D. Coles, referee therein, on the 25th day of March, 1903, a certain contract or agreement in writing between the plaintiff and the defendant in said cause, dated January 21, 1898, and relating to the painting of cars by the plaintiff for the defendant."

Mr. Jamison: "I next offer in evidence a petition filed on behalf of the plaintiff, signed 'Lyon & Swarts, Attorneys for Plaintiff,' and duly verified by the affidavit of plaintiff on the 24th day of March, 1903, for

an order requiring defendant to produce, during the trial of the case, the contract and agreement, dated January 21, 1898, and ask that it be marked, 'Exhibit 6,' which is as follows:

“ ‘*In the Circuit Court of St. Louis. No. 26403 A.*
Room 7. Pending before Hon. Walter
D. Coles, Referee.

“ ‘Now comes the plaintiff in the above-entitled cause and moves the referee to make an order on the defendant in said cause to produce upon the trial thereof the contract or agreement, dated January 21st, 1898, and made between the plaintiff and the defendant, and relating to the painting of cars by the plaintiff for the defendant.

“ ‘And the plaintiff states that he is advised by counsel, and verily believes, that said contract or agreement is material to the trial of said cause; that said contract or agreement relates to the painting of cars, alleged in the petition in said cause and shown in the plaintiff's statement of account filed with said petition and marked “Exhibit A” as having been done by the plaintiff for the defendant; and that said contract or agreement is in the custody, possession or power, or under the control, of the defendant.

“ ‘LYON & SWARTS,

“Attorneys for Plaintiff.’ ”

The petition was properly verified. Defendant rested.

On October 16, 1903, the report and finding of the referee was made and filed by him in the circuit court of said city, and in part is as follows:

“From the evidence in this cause, the special master finds that, on, or about, January 21, 1898, defendant employed plaintiff to take general charge of the painting department of defendant's car works, and to paint cars for defendant, and to do such other painting

as defendant might request plaintiff to do. That an agreement and contract, concerning plaintiff's employment, was at that time made and entered into between plaintiff and defendant, part of which said contract was reduced to writing and signed by the parties, and part of which said contract was verbal. That the writing then signed and executed by the parties, as part of said contract, was in the following terms:" Then follows a copy of the contract, which was executed in duplicate by the parties on January 21, 1898.

"That contemporaneously with the execution of the foregoing writing it was verbally agreed between plaintiff and defendant that, in addition to painting cars and car signs, plaintiff should do such other painting for defendant, as defendant might from time to time direct plaintiff to do; that plaintiff should furnish defendant with paint and oil for the use of defendant's car builders for car building purposes, and defendant agreed to pay plaintiff the reasonable cost value thereof; that the stock of paints and paint materials and miscellaneous painters' tools owned by defendant, and on hand at the time that plaintiff began his employment with defendant, should be turned over to plaintiff as his property, and charged to plaintiff at the reasonable market value thereof, and that at the termination of plaintiff's employment by the defendant, the stock of paints and paint materials and miscellaneous painters' tools then on hand and owned by the plaintiff, should be turned over to the defendant as its property, and charged by plaintiff to defendant, at the then reasonable market value thereof.

"That the writing above referred to as embodying part of the contract between plaintiff and defendant, was executed in duplicate, plaintiff taking one copy and defendant one copy. That after said writing was executed by the parties, and between January 21, 1898,

and February 3, 1898, plaintiff altered the duplicate copy of said writing in his possession, by writing thereon and interlining therein certain words, so that said writing, with the interlined words written therein by plaintiff, read as follows: (The words interlined by plaintiff are enclosed in parentheses and under-scored).” Then follows a copy of said contract with the interlineations, as made by the plaintiff:

“The referee finds that prior to the time at which the plaintiff made the alterations or interlineations upon the copy of the contract retained by him, as above specified, the defendant had verbally agreed with the plaintiff that that part of the contract between plaintiff and defendant embodied in said writing should be modified as expressed by the plaintiff in such alterations or interlineations. The referee further finds that plaintiff was not authorized by defendant to alter or change said writing in any manner, and that said alterations, although made by plaintiff in good faith, and without fraudulent purpose or intent on his part, were, in point of fact, made without the knowledge, authority, or consent of defendant.

“The referee further finds that plaintiff, in pursuance of his employment by defendant, did, between the 3rd day of February, 1898, and the 31st day of December, 1898, both inclusive, paint cars for the defendant, paint and letter signs for the defendant, perform other painting work at the special instance and request of the defendant, furnish the necessary tools for doing the aforesaid work, furnish all material necessary to do said work, and furnish the defendant’s car builders with lead and oil for car building purposes, all of which is more particularly set forth in the following statement of account, in which account is also set forth the prices agreed upon between plaintiff and defendant for said work and material, and which plaintiff was en-

titled to be paid by defendant therefor, in accordance with the terms of the contract aforesaid."

Then followed a statement of the account between them, showing a debit of \$61,976.55 of the company and a credit of \$56,742.56 in its favor.

"The referee further finds that upon the commencement of plaintiff's employment by defendant, to-wit, on February 3, 1898, the defendant turned over and delivered to plaintiff a stock of paints and paint materials and miscellaneous painters' tools, owned by the defendant, of the reasonable market value of \$5,202.63, and that upon the termination of plaintiff's employment, to-wit, December 31, 1898, plaintiff turned over and delivered to defendant the stock of paints and paint materials and miscellaneous painters' tools, owned by plaintiff, and then on hand, and that said property was of the reasonable value of \$6,902.38.

"The referee further finds that in painting cars for defendant, plaintiff did, in some instances, use other varnishes for finishing outside work than Noble & Hoar's varnish, and that in each instance where such other varnish was so used by plaintiff, defendant expressly authorized plaintiff to use the same. The referee finds that plaintiff made demand upon defendant on January 1, 1899, for the balance due to plaintiff from defendant. At the conclusion of the plaintiff's evidence, in chief, which evidence tended to sustain each and all of the foregoing findings, the defendant moved the referee to declare that under the pleadings and the evidence, plaintiff was not entitled to recover. The said motion was denied by the referee.

"That plaintiff did the work, and furnished the material, as heretofore stated herein, and that defendant made the payments on plaintiff's account, as previously specified, stands practically uncontroverted by the evidence. The defendant contends, however, that plaintiff is not entitled to a judgment against it herein,

for the reasons: (1) That it appears from the evidence that the original contract entered into between plaintiff and defendant was subsequently modified by the parties, and in order to entitle plaintiff to recover upon such modified contract, he should, in his petition, have set out the agreement as originally made, and have pleaded specifically the subsequent modification thereof. (2). That this is a suit upon a written contract, which contract, the evidence shows, was materially altered by plaintiff without defendant's authorization or consent, and thereby such contract was rendered void, and plaintiff precluded from any recovery thereon. The referee is of the opinion that under the pleadings and the evidence in this case, neither of the contentions made by the defendant ought to defeat plaintiff's recovery herein. Plaintiff, in his petition, alleges that he was employed to paint cars for defendant, and to do such other painting as he might be directed by defendant to do, and that defendant agreed to pay him a certain specified remuneration for such work. Defendant, in its original answer, which is in evidence, admitted 'that plaintiff was employed by defendant, as alleged in his petition.' The nature of plaintiff's employment by defendant, and the terms of such employment, being specifically alleged in the petition, the admission by defendant of plaintiff's employment, 'as alleged in his petition,' must be regarded as prima-facie proof of plaintiff's employment for the purposes and upon the terms stated in the petition.

"Furthermore, the referee is of the opinion that under the evidence, plaintiff is entitled to recover independently of the admission above referred to. The agreement between plaintiff and defendant as originally entered into constituted an entire contract, part of which contract was embodied in a writing, and part rested in parol. The contract, as originally made,

must, therefore, for purposes of pleading, be regarded as merely a parol contract, and where a parol contract is subsequently modified by parol, it is proper to declare upon the contract as modified, without setting out the prior agreement, out of which the ultimate contract was evolved. In this case, before performance of the original contract of employment was entered upon, it was modified in some particulars by the parties, and plaintiff has pleaded the agreement in its modified form, and as it stood when plaintiff began to work for defendant under such agreement. The referee holds that, in this case, it was entirely competent for plaintiff to declare upon the entire contract in its ultimate form, without specifically setting out the manner in which such contract was evolved, and without distinguishing in his pleadings the verbal and written elements which constituted it.

“The contention that plaintiff, by altering his copy of the written memorandum of January 21, 1898, thereby rendered void and unenforceable the contract between plaintiff and defendant, cannot avail the defendant in this cause, because, although the altered memorandum has been excluded as evidence, the defendant has itself put in evidence its unaltered and unmutilated copy of such contract. If plaintiff had been compelled to rely upon the altered copy of the contract to sustain his case, he could not have recovered thereon. But where a contract is executed in duplicate, as in this case, the fact that one copy of the contract has been materially altered by a party thereto, will not, in the absence of positive fraud, preclude such party from recovery under the unaltered duplicate, when the latter is properly in evidence.

“The referee accordingly finds that defendant is indebted to the plaintiff in the sum of \$68,878.93, being the aggregate amount of plaintiff's account for work and material, as previously stated, and of the

value of the stock of paints, paint materials and miscellaneous painters' tools, turned over by plaintiff to defendant, as heretofore stated; and that defendant has paid to plaintiff, on account of said indebtedness, the sum of \$61,945.19, as heretofore stated; and recommends that the judgment of the court be that plaintiff have and recover of defendant, the balance of the indebtedness due from defendant to plaintiff, to-wit, the sum of \$6,933.74, together with interest thereon, at 6 per cent per annum, from January 1, 1899, and costs."

In due time defendant filed exceptions to the report of the referee, and assigned thirty-one grounds for setting it aside, which are too lengthy to set out.

The court then, on January 6, 1904, overruled said objections, and rendered judgment for plaintiff for the sum of \$9,019.64. Exceptions were duly saved, and in due time defendant filed motions for a new trial and in arrest of judgment, which were, by the court, overruled, and defendant duly excepted and has prosecuted its appeal to this court.

OPINION.

I.

The plaintiff for his cause of action alleges, that on or about January 21, 1898, the defendant employed him to do certain painting for it at certain prices, and he to furnish all the materials required; and that he agreed with defendant to take all the paints and materials it had on hand at the time he began the work at their reasonable market value, and that defendant agreed to take back the paints and materials he had on hand at the time his employment ceased at their market value. And, that, in pursuance of said employment, he turned back to defendant all the paints and materials he had on hand, which were accepted by it; and,

that, after allowing defendant all just credits, there was still due him for said work and materials the sum of \$7,370.02.

Of course, the employment of plaintiff must have been by some sort of contract, but the petition is silent as to the kind of contract that was entered into between him and the defendant; but, when it became necessary for him to prove his case, he offered in evidence a written contract, dated January 21, 1898, signed by himself and the Car Company, which is the one set out in the statement accompanying this case. In fact, several times during the progress of the trial plaintiff himself, and his counsel, admitted and stated that was the contract referred to in the petition. It must be borne in mind that, according to the terms of that contract, the only things the plaintiff agrees to do for defendant is to paint the kind of cars and the signs therein described, and to furnish the necessary tools and materials with which to do the work. There is no provision in that contract whereby plaintiff agrees to purchase of defendant the paints and materials it had on hand at the time he began work for the company, nor is there a provision therein which requires the defendant to buy back the paints and materials the plaintiff might have on hand at the time he ceased to work for defendant; and the only thing defendant agreed to do by that contract was to pay plaintiff the prices therein stated for all the work he should do according to the terms of the contract.

There is no other contract mentioned in the petition, except the one above mentioned.

Plaintiff having sued on a special contract, he must recover upon that contract or not at all. Having elected to stand on the written contract, he cannot recover upon a contract, part of which it is alleged is in writing and another part resting in parol, or upon a

quantum meruit for work and labor done or services rendered.

For this reason all parol evidence as to the terms of the contract should have been excluded. [Cole v. Armour, 154 Mo. 350, 351, and cases cited.]

He cannot sue on one cause of action and recover upon another. [Clements v. Yeates, 69 Mo. 625, 626; Smith v. Shell, 82 Mo. 219; Henning v. United States Ins. Co., 47 Mo. 431.]

Plaintiff recognizes the application of the above rule and endeavors to evade the effects of it by saying that the evidence in the case shows that "the original contract was verbal and a part only was reduced to writing" and for that reason the principle which prohibits the introduction of parol contemporaneous evidence does not apply when the original contract was verbal and entire, and a part only was reduced to writing. [Brown v. Bowen, 90 Mo. 189; Roe v. Bank of Versailles, 167 Mo. 427.]

There are three reasons why the last-mentioned rule does not apply to this case: First. Because such a contract must be pleaded, which is not done in this case. [Henning v. United States Ins. Co., 47 Mo. 431; Roe v. Bank of Versailles, 167 Mo. 416; Railroad v. Curtis, 154 Mo. 14, 17, 18; Brown v. Bowen, 90 Mo. 189; Moss v. Green, 41 Mo. 390, 391; Rollins v. Claybrook, 22 Mo. 406, 407.] Second. That rule never applies except in cases where the part of the contract which is reduced to writing shows upon its face that it is incomplete and that it does not purport to be a complete expression of the entire contract. [Ringer v. Holtzclaw, 112 Mo. 523; Moss v. Green, 41 Mo. 390, 391; State v. Cunningham, 154 Mo. 161-172; Rollins v. Claybrook, 22 Mo. 405; Ellis v. Bray, 79 Mo. 238; O'Neil v. Crain, 67 Mo. 251-2.] And, third, the plaintiff repeatedly stated in his testimony that the verbal contract was not made until after the expiration of at least two days,

and probably a week, after the written contract was executed. Under that state of facts, clearly the parol evidence of the verbal agreement should have been excluded. As stated by Judge SHERWOOD, "In the first place, it is one of the fundamentals of the law of evidence that all precedent as well as all contemporaneous negotiations in relation to a contract afterwards reduced to writing are, in the absence of accident, etc., conclusively presumed to have been swallowed up by, and entirely merged and expressed in, the written instrument, which thenceforth becomes the sole expression of the will and agreement of the contracting parties. This rule has been unvaryingly observed and announced by this court from its earliest to its more recent decisions." [Boyd v. Paul, 125 Mo. l. c. 13; Seitz v. Brewers Co., 141 U. S. 510; Ringer v. Holtzclaw, 112 Mo. 523; Railroad v. Curtis, 154 Mo. 22; Parker v. Vanhoozer, 142 Mo. 627; Laclede Const. Co. v. Moss Tie Co., 185 Mo. l. c. 61.]

According to these authorities the referee erred in holding that there was but one contract entered into between the parties, part of which was reduced to writing and part of it in parol. There were either two separate and distinct contracts, or the one contract dated January 21, 1898, and subsequently modified by agreement of the parties, and which is true is not exactly plain, as there is evidence tending to establish both propositions.

II.

The plaintiff in order to establish the allegations of his petition offered in evidence the duplicate copy of the contract which was delivered to him, and bearing date of January 21, 1898. It was admitted at the trial that said copy had been interlined and altered by the plaintiff, and without the knowledge or consent of defendant. When this fact appeared, defendant secured

permission to file an amended answer, and on March 25, 1903, it filed its amended answer, which is set out in the statement accompanying this opinion, denying under oath the execution of the written contract sued on, and at the same time handed to plaintiff's counsel the copy of the contract retained by the defendant; but it seems that this copy was never offered in evidence, nor was the altered copy ever admitted in evidence; but, after the filing of the amended answer, plaintiff, over the unsuccessful objection of defendant, introduced the original answer of defendant, as an admission of the allegations of the petition, and it duly excepted.

The point is now made that the alteration of the copy by plaintiff nullified the written contract, and for that reason the contract was void when the suit was instituted; and, that, being ignorant of the alteration, when it filed the original answer, the filing of that answer by defendant did not have the effect of breathing new life into that contract, or to constitute an admission of the facts stated in the petition, which it supposed was a declaration based upon the original unaltered contract between the parties, and for that reason the court erred in admitting the answer in evidence.

There is no pretense in the case that defendant had any knowledge or notice of the alteration at the time it filed the original answer or prior to the time the altered copy was offered in evidence. That the alteration of the instrument by the plaintiff nullified it is not questioned, as the law is well settled in this State upon that point. [Kelly v. Thuey, 143 Mo. 432-434.]

To evade the force and effect of this well-grounded rule of evidence, plaintiff resorts to another rule of evidence, equally well established in this State, which permits a party to introduce in evidence the admissions of the other party against his interest, which

includes abandoned pleadings in the case. [Walser v. Wear, 141 Mo. 463.]

No case has been cited, nor do we know of any, which holds that an admission made under such a misapprehension of the facts, as is shown to exist in this case, is admissible in evidence to make out plaintiff's case. Such a rule would work an injustice upon the defendant, because it supposed and naturally supposed the petition declared upon the contract of January 21, 1898, as originally written and executed, and it never for a moment supposed that plaintiff was declaring upon an altered contract—in fact, it never knew of the alteration for four or five years after the alteration occurred. To admit the original answer under such circumstances would also enable plaintiff to take advantage of his own wrong in altering the contract. In the absence of express authority to the contrary, we cannot lend our assent to the proposition that the answer in this case was admissible in evidence.

III.

Plaintiff repeatedly stated during the progress of the trial that he could prove his cause of action by the introduction of the copy of it retained by the defendant, and the evidence shows that he filed a petition with the referee praying for an order requiring defendant to produce its said copy; and also served a notice upon its counsel to produce its copy in court to be used in evidence in the case, which was complied with, but apparently was never offered in evidence.

There are three reasons why plaintiff cannot recover upon defendant's copy of the contract:

First. It was not sued on.

Second. It was not offered in evidence.

Third. The alteration of his duplicate vitiated the whole contract *as it then* existed. [Mfg. Co. v.

Hudson, 113 Mo. App. 344; Hord v. Taubman, 79 Mo. 101; First National Bank v. Fricke, 75 Mo. 178; Flynn v. Union Bridge Co., 42 Mo. App. 529.]

IV.

The referee found as a fact that the alteration of the contract was made in good faith and with no fraudulent intent, and held as a matter of law under those facts the contract was not nullified by the alterations.

That is not the law of this State. A material alteration of a written instrument by one of the parties by adding words to it will release the other party thereto. And the rule holds even though the alteration is made in good faith, in order to make it conform to the real agreement of the parties. The instrument is vitiated regardless of the intent of the party making it. [Evans v. Foreman, 60 Mo. 449; Capital Bank v. Armstrong, 62 Mo. 59; Iron Mountain Bank v. Murdock, 62 Mo. 70.]

V.

Plaintiff's next contention is that the original contract was modified and varied by oral agreement between the parties, and, therefore, no action could be maintained on it; the whole matter is thrown into parol, and the written contract is of no avail as between the parties, except as bearing upon the measure of damages and such matters. This contention is fully sustained by the case of Boyd v. Camp, 31 Mo. 163. While the question of pleading was not raised in that case, yet the point has been before this court in other cases. It will not be denied the parties to a contract may by a subsequent agreement upon a sufficient consideration change or modify the terms of their written contract. But in suits based upon such modified contracts, the contract so modified must be distinctly pleaded. The petition in this case alleges an absolute,

independent agreement, disconnected with any other previous transaction. In speaking of a similar case this court used this language: "The petition sets forth an absolute, independent agreement disconnected with any other previous transaction, and such being the case, it was not competent for plaintiffs at the trial to blend the two and graft the verbal on the prior written contract." [Henning v. United States Ins. Co., 47 Mo. l. c. 431.] That is exactly what was done in this case, and the referee recommended, and the circuit court rendered judgment against the defendant on that theory, which was erroneous. The contract as modified must be declared upon. [Warren v. Mayer Mfg. Co., 161 Mo. 116, 117.]

VI.

Plaintiff finally contends that this suit may be considered as one of *quantum meruit*, and if so considered all objections of defendant as to both pleadings and as to the admissibility of the evidence is disposed of. The trouble with that position is that it is not such a suit. It is clearly a suit upon contract, as shown both by the pleading and the evidence, and this court would be doing violence to all rules of pleading to adopt such a course in this kind of a case.

VII.

Both parties raise several other points regarding the admissibility and rejection of evidence, which will not arise in the next trial if the case is tried according to the views herein expressed.

For the reasons before stated, the judgment of the circuit court is reversed and the cause remanded.

All concur.

RAYMOND WAHL, by next friend, BERTHA A. WAHL, v. ST. LOUIS TRANSIT COMPANY, Appellant, and UNITED RAILWAYS COMPANY.

Division Two, April 2, 1907.

1. **NEGLIGENCE: Motorman: Scope of Duties: Waving at and Frightening Child: Allegations.** A motorman in control of and operating a street car in a public street has authority to do all acts reasonably necessary and incidental to the proper discharge of his duties, among which is the duty to so operate the car as not to injure pedestrians and children on the street who may assume positions of danger, and to warn persons away from places of danger, and if he negligently fails to do that and as a result pedestrians are injured by the car, it is the negligent act of his employer; and an allegation that defendant was operating a car in charge of its motorman on a named public street, and that at a certain point the motorman negligently left his post on the car and negligently waved to plaintiff, who was a child of tender years playing on a pile of loose earth beside the track, and thereby so frightened him as to cause him to start to run across the track in front of the car, are sufficient to show that the act of the motorman was within the scope of his employment.
2. ———: ———: ———: ———: **Evidence.** A child was standing within a foot and a half of the track when the car was yet ten or fifteen feet from him. According to plaintiff's evidence the motorman stepped from his place in front of the car, and with his right foot upon the step of the front platform reached out with his arm to wave or frighten the child away, whereupon the child started to run across the track in front of the car and was struck by it. *Held*, that, ordinary care would have suggested to the motorman, considering the tender years of the child, to slow down his car and stop it if necessary until he was assured of the child's safety, and the act was done in his master's service, and came within the scope of his employment, and a verdict finding that it was negligent is upheld.
3. ———: ———: ———: **Instruction.** An instruction setting forth the general acts of negligence charged, and correct as far as it goes, is not erroneous because it does not specifically require the jury to find that the negligent act of the motorman was within the scope of his authority. If defendant considered that a defect in the instruction, it was its duty to supply it by asking an instruction on the subject.

4. ———: Rejecting Testimony. The appellate court will not reject the testimony of witnesses as unworthy of belief. It is for the jury to determine which of the witnesses they will believe.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough*, Judge.

AFFIRMED.

Glendy B. Arnold for appellant; *Boyle & Priest* of counsel.

(1) Even though it were true that the motorman got down on the step and reached toward plaintiff and thereby caused him to run in front of the car and to be injured, yet defendant is not liable, because it appears from all the evidence in this record that such an act did not pertain to the particular duties of the motorman as such and was not within the scope of his employment. *Snyder v. Railroad*, 60 Mo. 413; *Cousins v. Railroad*, 66 Mo. 576; *Meade v. Railroad*, 68 Mo. App. 97; *Overton v. Railroad*, 111 Mo. App. 613; *Railroad v. Mogk*, 44 Ill. App. 17, 80 Ill. 411. (2) The judgment should be reversed because the verdict of the jury was actuated by passion and prejudice against defendant and sympathy and compassion for plaintiff. *Spohn v. Railroad*, 87 Mo. 84; *Lehnick v. Railroad*, 94 S. W. 996.

A. R. Taylor, Bishop & Cobbs and *Albert E. Hausman* for respondent.

(1) It is the highest duty of the motorman in operating cars in streets of a city to take care to avoid running his car over persons on the street, whether adults or children. *Riska v. Railroad*, 180 Mo. 179; *Eckhard v. Railroad*, 190 Mo. 618; *Koenig v. Railroad*, 194 Mo. 573. (2) Instructions which are good as far

as they go, but do not cover the entire case, amount in civil cases only to non-direction and not to error, and it is the duty of the other party to ask proper instructions to supply the shortcomings of those asked by his adversary. *Bank v. Ragsdale*, 171 Mo. 186; *Drey v. Doyle*, 99 Mo. 465; *Cornwell v. Railroad*, 106 Mo. App. 135, 174 Mo. 444; *Railroad v. Randolph Townsite Company*, 103 Mo. 468; *Montgomery v. Railroad*, 181 Mo. 477; *Hall v. Hall*, 107 Mo. 101; *Wheeler v. Bowles*, 163 Mo. 398; 11 Ency. Pl. and Pr., pp. 217 to 224; 2 Thompson on Trials (1889), pp. 1639, 1697. (3) It is misleading and confusing to incorporate in an instruction facts which are not in dispute, thus requiring proof of them by the party alleging them. Such facts may be assumed. *Anderson v. Bradford*, 102 Mo. App. 433; *Park v. Railroad*, 178 Mo. 108; *McLean v. Kansas City*, 100 Mo. App. 625; *State ex rel. v. Branch*, 151 Mo. 630; *Farber v. Railroad*, 139 Mo. 285; *Weldon v. Railroad*, 93 Mo. App. 675. (4) Defendant can not now call upon the appellate court to decide a question of fact which it did not offer to submit to the jury by a request that the trial court give an instruction properly submitting said question to the jury. A party is limited on appeal to the theory upon which he tried his case in the lower court. *Bertram v. Railroad*, 108 Mo. App. 70; *Horgan v. Brady*, 155 Mo. 659; *Chinn v. Naylor*, 182 Mo. 583.

GANTT, J.—This is an action by Raymond Wahl, a minor, who at the time of his injury was of the age of five years. The action was brought through his mother, who was duly appointed as his next friend prior to the filing of the petition. The petition alleges that the defendant, at the time of the injuries complained of, was a corporation by virtue of the laws of Missouri, and used and operated a railway and the cars

thereon for the purpose of transporting persons for hire from one point to another in the city of St. Louis. That Twenty-second street at the time and place mentioned in the petition was an open public street within the city of St. Louis; that on the 3d day of June, 1903, the plaintiff was on Twenty-second street north of Montgomery street near the defendant's track and in danger, by reason of his youth and want of discretion, of being struck and injured by the defendant's north-bound car then approaching the place where plaintiff was beside and near the defendant's track; that whilst plaintiff was in such exposed position liable by reason of his youth and want of discretion to expose himself to peril from said car, the motorman of said car negligently left his post on said car where he could control and manage the said car and negligently waved to the plaintiff and other children to move, and thereby caused the plaintiff, who was standing on the side of the bank near the defendant's track, to start to run across said track whilst said motorman was so negligently away from his post, and when he was unable to reach his post and stop said car, and thereby negligently caused and suffered said car to run upon and against the plaintiff, and drag him and permanently injure him, cutting off his right thumb, crushing and mangling the fingers of his right hand, crushing his right hand, tearing off his scalp and lacerating his head, knocking out six teeth, lacerating his face, lips and mouth and injuring him internally. That by his injuries so sustained plaintiff has suffered and will suffer great pain of mind and body and is maimed and crippled for life and will lose the earnings of his labor after he shall arrive at the age of twenty-one. He prayed for damages in the sum of ten thousand dollars. The answer was a general denial.

The action was originally brought against both the St. Louis Transit Company and the United Rail-

ways Company, but at the close of the evidence, the trial court sustained a demurrer to the evidence in behalf of the United Railways and the cause went to the jury against the defendant Transit Company only.

The evidence for the plaintiff tended to prove that Twenty-second street and Montgomery street are both public highways in the city of St. Louis. Montgomery street runs west from Twenty-second street, but does not cross Twenty-second to the east; that on the third of June, 1903, the Transit Company, the defendant herein, operated a single track railway on Twenty-second street, on which its cars ran north; that the plaintiff's mother lived three doors from the corner of Montgomery and Twenty-second streets at house numbered 2205 Montgomery street, and plaintiff's father was dead. At the time of the injury, the plaintiff was five and a half years old and lived with his mother. On the third day of June, 1903, the La-clede Gas Light Company was engaged in putting some gas pipes just north of the north crossing of Montgomery and Twenty-second streets, and for this reason had excavated a trench in Twenty-second street, a foot or so north of said north crossing. The Gas Company in making the excavation in Twenty-second street near the north crossing thereof on Montgomery street, had by their servants thrown the dirt taken out of the trenches into a pile on the north side of the trench and this pile of dirt extended up to within a foot or so of defendant's track. The plaintiff was playing at this pile of dirt, filling a box he had with loose dirt and then emptying it again. The plaintiff's evidence tended to show that while at play on this pile of dirt, he was in dangerous proximity to a passing car if he should move or slip toward the track. A north-bound car on defendant's track came along about five o'clock that afternoon. The motorman on this car, seeing the

child was near the track, stepped from his place at the front of the car, with his right foot down on the step of the front platform, and as it approached where the child was, reached out with his arm to wave or frighten the child away, whereupon the plaintiff undertook to run across the track in front of the car, and was struck and knocked down by it and run over and sustained the injuries alleged in the petition. The injuries were so serious that the verdict is not assailed as excessive if otherwise proper.

There was a sharp conflict in the evidence. On the part of the plaintiff the evidence of two of the employees of the Gas Light Company, Sims and Murphy, tended to show that they were working in the trench, which was about two and a half feet wide and from one to four feet deep, north of and adjoining the north crossing of Montgomery street and running east and west from the car track toward the curbing. Murphy was digging in the trench and Sims was shoveling away the earth and macadam that Murphy had thrown out within about a foot of the trench and on the north side thereof and running its full length. The earth was piled up a foot or two high. Sims testified that he was standing on the north side of the hole at the west end near the track and the little boy, the plaintiff, was playing with the dirt that he piled up there; that the little boy was standing near enough to the track, if he had remained still, for the motorman to have reached out with his hand and touched him, or about three feet from the side of the car; that when the motorman reached out, the plaintiff started to run. The plaintiff was looking at the car as it came towards him; when the motorman reached out after him he got scared and ran down and around the pile of dirt and went in front of the car; the car did not stop at the crossing,

though the evidence tends to show that one passenger jumped off there. When the motorman saw the plaintiff start towards the track, he stepped back to his post and tried to stop the car before it struck the boy, but before the motorman regained his position, the boy was knocked down by the car. The two witnesses, Sims and Murphy, fixed the place of the accident near the trench where they were working not over six feet from the crossing; another witness for the plaintiff, a passenger, thought it occurred about twenty feet from the crossing "more or less;" and a lady, Mrs. Heitland, testified that she saw the car just as it was coming from the crossing at Montgomery street, and saw the child jump from the mud pile that the gas men were digging, and he ran right on to the car track; she did not wait to see what became of the boy after the car struck him; she did not think the car was more than ten feet across the crossing when the accident happened.

The defendant's evidence tended to establish that the ditch or trench dug by the gas men ran north and south within four or five feet of the east side of the defendant's track; that the earth thrown up had formed a mound parallel with the track; that when plaintiff was struck by the car, he was from sixty-five to one hundred feet north of the north crossing of Montgomery street; that the car in question made a stop at the north crossing of Montgomery street and a passenger alighted there; that plaintiff was playing on the mound of dirt in the street; when the car was within ten or fifteen feet of plaintiff he turned around, saw it and started in a run across the track in front of the moving car; when on or about the east rail of the track and within about five feet of the car, he stumbled and fell between the rails; that upon seeing the plaintiff start towards the track, the motorman reversed the car and brought it to a stop within some ten or fifteen feet

after it had struck the body of the little boy; that the motorman was at his post of duty as the car passed Montgomery street, and so remained until it was stopped by him after it had struck the plaintiff. The motorman in his testimony was asked: "You are the motorman who had charge of the car that struck the little boy here are you?" Ans. "Yes, sir."

Mr. J. J. Cordes testified that the plaintiff walked to about a foot and a half from the rail of the track, then stopped; when the car got within five or ten feet of the boy he looked up again; he supposed he was going across the track to his companions, and just then the boy happened to fall there on the track and the car came along and the motorman could not stop it in time to prevent striking him. On cross-examination he stated that the boy was in about the middle of the roadway between the track and the curb on the east, and he thought the roadway was about six feet, that would make the boy about three feet from the track. The boy then walked towards the track, the car was then ten or fifteen feet away from him and he walked about a foot and a half from the rail, the car was about ten or fifteen feet from him, he stopped right there and looked at the car, then the motorman rang the bell, then the boy made to cross the street, and he must have stumbled over something and fell inside of the track, he got about a foot within the rails. The car was about five feet from him when he stumbled. The right front gate of the front platform was open.

At the close of the evidence the court gave the following instruction for the plaintiff:

"If the jury find from the evidence in this case that on the 3rd day of June, 1903, the defendant was operating the railway and car mentioned in the evidence, and if the jury find from the evidence that on said day Twenty-second street at the places mentioned

in the evidence, was an open public street within the city of St. Louis, and if the jury find from the evidence that on said day the plaintiff was on said Twenty-second street north of Montgomery street near defendant's track, and that at said time the plaintiff was of tender years and without discretion to understand the peril of being struck by defendant's car, and if the jury find from the evidence that as defendant's car approached the place where the plaintiff was so upon said street defendant's motorman stepped on the step of the front platform of said car and reached with his hand towards the plaintiff and frightened him, and if the jury find from the evidence that the plaintiff was thereby and by reason of his want of discretion, caused to run in front of said car and to be knocked down, dragged and injured by said car, and if the jury find from the evidence that defendant's motorman did not exercise ordinary care in so reaching towards the plaintiff and causing him to be frightened and that thereby the plaintiff was so caused to sustain said injuries, then plaintiff is entitled to recover."

The court also instructed as to the credibility of witnesses, and gave the usual instruction on the measure of damages.

The defendant requested the court to instruct the jury: "If you find from the evidence in this case that plaintiff went suddenly upon the north-bound track in such close proximity to defendant's moving car as to render it impossible for the motorman in charge thereof by the exercise of ordinary care and with the use of the appliances at hand to stop said car in time to avoid striking plaintiff, then he is not entitled to recover and your verdict must be for the defendant." The court refused this instruction as asked, but added to it the words, "Unless you believe he was caused to so go

upon defendant's track in consequence of having been frightened by defendant's motorman in charge of said car," and gave it as amended, to which amendment the defendant then and there at the time duly excepted. The defendant also asked an instruction in the nature of a demurrer to the evidence, at the close of plaintiff's case, which was refused as to the Transit Company, and defendant duly excepted.

The jury returned a verdict for the plaintiff and assessed his damages at five thousand dollars, and the judgment was rendered accordingly. Within proper time the defendant filed its motion for a new trial and in arrest of judgment, which were overruled, and the defendant appealed to this court.

I. Only two assignments of error are made by the defendant for the reversal of the judgment. The first point is that the first instruction given for the plaintiff did not submit to the jury any act of the motorman which can lawfully be held to be negligence; that the act of negligence submitted by said first instruction is not an act alleged by or which appears from the petition to have been within the scope of the duty of the motorman. The petition alleges that the defendant herein was a corporation and was using and operating a railway and cars for the transportation of persons for hire from one point to another in the city of St. Louis, and that Twenty-second street was an open public street in said city, in which the defendant had a track, and that on the day of the injury to plaintiff, the plaintiff was standing near the defendant's said track and by reason of his youth and want of discretion was in danger of being struck and injured by defendant's north-bound car then approaching the place where he stood near the said track, and that the motorman of said car negligently left his post on said car where he could control and manage it and negligently

waved to the plaintiff and thereby caused plaintiff to start to run across the said track while said motorman was so negligently away from his post, and when he was unable to reach his post and stop said car, and negligently caused and suffered said car to run over plaintiff and permanently injure him. These allegations amount to the charge that the defendant was operating a car in charge of one of its motormen upon a public street and the legal implication follows that it was the imperative duty of the motorman to so manage and control the said car, of whose motive power he was in charge, as to prevent said car from running over persons in the street, and the allegation that instead of so doing the motorman negligently left his post and negligently waved to the plaintiff who was a child of tender years and incapable by reason of his youth and want of discretion from understanding his danger of being struck by said car, and so frightened the plaintiff as to cause him to start to run across said track in front of the car, we think was sufficient to show that the act of the motorman was within the scope of his employment. We think that a motorman engaged in controlling and operating a public conveyance on the public streets of the city has authority to do all acts reasonably necessary or incidental to the proper discharge of his duties as such motorman, among which is his duty to so operate his car as not to injure pedestrians or children on the public streets who may assume positions of danger, and to warn persons away from places of danger, and if he negligently fails to do so and thereby pedestrians are injured by his car, it is the negligent act of his employer. The facts alleged in the petition and those upon which the plaintiff's first instruction are predicated were sufficient to show that the motorman was acting within the scope of his duties as the agent and employee of the defendant. In support of

its contention that it is not liable because it appears from the evidence that the act of the motorman in frightening the little boy did not pertain to the duties of the motorman as such and was not within the scope of his employment, we are cited by the defendant to the decision of this court in *Snyder v. Railroad*, 60 Mo. 413. In that case, it was held that "the rule is firmly established that the master is civilly liable for the tortious acts of his servants, whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved of or forbidden them. [*Garretzen v. Duenckel*, 50 Mo. 104.]" And this doctrine has been reasserted in *Milton v. Railroad*, 193 Mo. l. c. 57, and *Chicago Herald Company v. Bryan*, 195 Mo. 574. The chief difficulty which has arisen in the application of this rule has been in ascertaining whether the act complained of was committed in the course of the servant's employment.

In *Snyder v. Railroad*, this court cited with approval the case of *Wilton v. Railroad*, 107 Mass. 108, in which it appeared that the plaintiff, a girl of nine years of age, was walking with several other girls upon the Charleston bridge about seven o'clock in the evening, when one of defendant's horse cars came along very slowly and the driver beckoned to the girls to get on, they thereupon got on the front platform and the driver immediately struck his horses, when by reason of their sudden starting, plaintiff lost her balance and fell so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire and that the driver had no authority to take the girls upon the car and carry them unless such authority was implied from the fact of his employment as driver; the court said: "The driver of a horse car

is an agent of the corporation in operating the car. If in violation of his instructions, he permits persons to ride without paying, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duty, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions." In the Snyder case the question before the court was the sufficiency of a petition upon demurrer. The petition in that case charged that the injury complained of was received by the plaintiff's son while attempting to get on the cars in consequence of an invitation extended to him at the time by the servant of the defendant in charge of said cars, and this court asked the question upon such averment: "Can such injury be said to have happened by reason of any act of defendant's servants within the scope of their employment? It is charged to have been the running of the engine and cars of the defendant between two points within the limits of the city of St. Joseph. It does not appear whether such cars were at the time being used in the transportation of passengers or of *freight only*, or whether the defendant's servants were merely engaged in switching cars to be thereafter used for passengers or freight." Judge HOUGH, in the further discussion of the case, cited with approval the case of Flower v. Railroad, 69 Pa. St. 210; in that case the fireman on an engine, which with a tender and one freight car had been detached from a train of cars and was standing at a water station for water, requested a small boy standing near to put in the hose and turn on the water, and while the boy was climbing on the

tender to put in the hose, the freight cars belonging to the train ran down without a brakeman and struck the car behind the tender and the boy fell from the tender and was crushed to death. There was testimony that the engineers were not permitted to receive any one on the engine but the conductor and the superintendent. The court held that the boy was not a passenger or one to whom the company owed a special duty, and then asked the question: "Was there a general authority which would comprehend the fireman's request to the boy to fill the engine-tank with water? This seems to be equally plain without resorting to the evidence given, that engineers are not permitted to receive anyone on the engine but the conductor, and the fireman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity." Accordingly this court held in the Snyder case that the acts of the defendant's servants as alleged in the petition, in inducing, encouraging and permitting the plaintiff's son and others to ride upon the cars operated by them cannot be viewed as having been done by them in the course of their employment. But in the same case, the case of *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 29, was cited with approval. In that case, the servant of the defendant who negligently left a horse and cart in his charge, unattended in the street, whereby an infant, who merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, and to whom no concurrent negligence could be imputed, was injured, was clearly guilty of a negligent act in the course of his employment. And this court in the Snyder case said: "The petition contains no allegation of negligence on the part of defendant's servants at the time the child attempted to get upon the train. Such an al-

legation would have brought the case within the rule laid down in *Lynch v. Nurdin*, if the negligent acts alleged pertained to the particular duties of the servant's employment."

The facts of this case clearly distinguish it from *Snyder v. Railroad*, *supra*. Here the negligent act charged pertained directly to the duties of the motorman as such, among which, as we have already said, was his duty to so manage his car as not to negligently injure pedestrians, whether adults or infants of tender years, and to warn them when apparently in danger, of the approach of his car, and the charge is that he negligently so performed that duty as to frighten a child with no discretion and too young to appreciate his danger and thereby caused him to run upon the track in front of the moving car and to be injured. This was the method resorted to by the motorman to guard the child from being run over. It is true the defendant insists there was no proof of what the purpose of the motorman was in making the motion to the child with his hand. The motorman denied that he made such a motion, but the jury evidently found that he did and ascribed to him a good motive rather than a bad one. The jury were justified in holding that he adopted this method of warning the child. Taking the defendant's own witness Cordes' testimony, it appears that the child was standing within a foot and a half of the rail when the car was yet ten or fifteen feet from him. In such circumstances, ordinary care would have suggested to the motorman, considering the tender years of the plaintiff, to slow down his car and stop if necessary until he was assured of the safety of the child. The law made it his duty not to run over children in the street and the jury found that the very act that he did was in trying to serve his master by scaring the child away from its dangerous position. Under all the evi-

dence we think the jury was justified in finding that the act was one done in his master's service and within the scope of his employment, and considering the age of the child, his proximity to the rail of the track on which the car was moving, and all the circumstances, the jury was justified in finding that it was a negligent act.

Defendant, however, urges as another objection to this instruction of the plaintiff, that it fails to submit to the jury that the act of the motorman was within the scope of his duty as a motorman. We do not think this position is tenable. The defendant asked no instruction of the court to the effect that this act of the motorman was not within the scope of the motorman's duty and the case was evidently tried on both sides on the theory that, if the motorman was guilty of the acts charged in the petition, and left to be found by the jury in the plaintiff's instruction, the defendant was liable. That the instruction was correct as far as it went there can be, in our opinion, no doubt, and the fact that the court did not go further and direct the jury specifically to find that it was within the scope of the motorman's employment, we have often ruled is not error, but it is the duty of the opposite side to ask a proper instruction to supply the defect which he deems necessary in those of his adversary. [First National Bank v. Ragsdale, 171 Mo. 168; Wheeler v. Bowles, 163 Mo. 398; Farber v. Railroad, 139 Mo. l. c. 285.]

Our conclusion is that neither of the objections to this instruction is well taken.

II. It is also urged that the verdict is a result of passion and prejudice on the part of the jury. We are asked by learned counsel to reject the testimony of Sims and Murphy as utterly unworthy of belief. We have read the testimony on both sides and while there is a conflict in the evidence, it was for the jury who saw

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the witnesses and heard them testify to determine which of them they would believe and they evidently believed the witnesses of the plaintiff and their verdict was approved by the circuit court who tried the case. This court cannot undertake to weigh the evidence and it has often decided that it would not. Were we, however, to go into this matter of weighing testimony, we would find it hard to reconcile the testimony of defendant's own witnesses. The jury, as was its duty, weighed the contradictions in the evidence and found for the plaintiff and we see no reason for interfering with their verdict, and the judgment must be and is affirmed.

Fox, P. J., and Burgess, J., concur.

MOFFATT et al. v. BOARD OF TRADE OF KANSAS CITY et al., Appellants.

Division Two, April 2, 1907.

APPELLATE JURISDICTION: Injunction. Where the suit is an injunction pure and simple and no constitutional question is involved, and the final decree from which the appeal is taken simply perpetuates the injunction against the defendants and adjudges costs against them, the Supreme Court has no jurisdiction of the appeal.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale*, Judge.

TRANSFERRED TO KANSAS CITY COURT OF APPEALS.

Kimbrough Stone and *Frank Hagerman* for appellants.

Harkless, Cryslar & Histed for respondents.

BURGESS, J.—This is an injunction proceeding pure and simple. No constitutional question is involved; so that, jurisdiction of this appeal could only be maintained on the ground that the amount in dispute exceeded the amount of four thousand five hundred dollars (Laws 1901, p. 107), and as the final decree from which the appeal is taken simply perpetuates the injunction against the defendants, their servants and employees, and adjudges against them the costs of the suit, this court has no jurisdiction of the appeal. [Scheurich v. Light Company, 183 Mo. 496.]

We, therefore, think the record should be transferred to the Kansas City Court of Appeals. It is so ordered. All concur.

HECKESCHER, Appellant, v. COOPER.

Division Two, April 2, 1907.

1. **EJECTMENT: Adverse Possession.** Adverse possession does not mean mere occupancy. The possession must be adverse to and in defiance of the true title; and although it be peaceable for twenty years, yet if it be not adverse to and inconsistent with the rights of the true owner, the occupant cannot claim the land by limitations.
2. ———: ———: **Claim of Ownership.** One cannot enter upon land supposing it to be Government land and occupy it for years and afterwards when he finds it to belong to plaintiff, set up a claim of adverse possession, and by asserting that he always claimed to be the owner and thought he had as good a title as any body else and in that belief and claim had occupied it for twenty years, defeat the title owner.

Appeal from McDonald Circuit Court.—*Hon. Henry C. Pepper*, Judge.

REVERSED AND REMANDED (*with directions*).

O. R. Puckett and George Hubbert for appellant.

(1) Defendant's possession of the land, with the recognition that it was land of the Government or of another, did not afford basis for adverse claim; nor could the statute start to run without some unequivocal change of attitude, such as is not to be found in this case. *Hunnewell v. Burchett*, 152 Mo. 611; *Stevenson v. Black*, 168 Mo. 561; *Comstock v. Eastwood*, 108 Mo. 41. (2) There was no definitely marked out and ascertainable part of the premises to which defendant could have had any title under the Statute of Limitations. His claim was a nullity because of the uncertainty of its limits. (3) The character of his possession could never start the statute to run against the true owner. *Baber v. Henderson*, 156 Mo. 566; *Hunnewell v. Adams*, 153 Mo. 440.

FOX, P. J.—This cause is now pending in this court upon appeal from a judgment rendered in the McDonald Circuit Court in favor of the defendant. This was an action in ejectment for the recovery of section 25, in township 22, range 31 west. The petition is in the ordinary and usual form in cases of this character and there is no necessity for inserting it here. To this petition the defendant filed the following answer:

"Now, at this day comes Zach Cooper, the above-named defendant, and for answer to the petition of the plaintiff herein, denies each and every, all and singular the allegations in the said petition made and contained, except as hereinafter specifically and directly admitted.

"The defendant avers that he is now in the possession of the following described lands lying, being and situated in the county of McDonald and State of Missouri, to-wit:

"Beginning twenty-four rods west of the southwest corner of section twenty-five, township twenty-two

north, range thirty-one west of the fifth principal meridian, in the county of McDonald and State of Missouri, thence north sixteen and one-half degrees west, ten rods; thence north twenty-one and one-half degrees west, twenty-eight rods; thence north six degrees west, twenty rods and fourteen links; thence north sixty-three degrees west, fourteen rods; thence north twenty-three and one-half degrees west, thirty-two rods; thence north sixty-nine degrees west, eighteen rods; thence north thirty-five degrees west, eight rods; thence north sixty-three degrees west, four rods and eleven links; thence north thirty-eight and one-half degrees west, fourteen rods; thence north seventy-seven degrees west, twenty-four rods; thence north sixty-four degrees west, thirteen rods; thence north twenty-eight degrees west, sixteen rods; thence north twenty-five degrees east, sixteen rods; thence north forty-nine degrees west, five rods and fifteen links; thence south fifty-six degrees west, twenty rods; thence south seventy-five degrees west, eight rods; thence north seventy-three degrees west, seventeen rods; thence north fifty-seven degrees west, fourteen rods; thence north seventy-one and one-half degrees west, sixty rods; thence north fifty-nine degrees west, sixteen rods; thence south forty-seven degrees west, ten rods; thence south thirty-two degrees east, sixteen rods; thence south twenty-six and one-half degrees east, fifty-five rods; thence south seventy-one degrees east, twenty-three rods; thence south five and one-half degrees east, thirty-two rods; thence south eighty-four degrees east, forty-one rods; thence south thirty-six degrees east, eight rods; thence south fifty-four degrees east, fourteen rods; thence south fifty degrees east, fifty rods; thence south twenty and one-half degrees east, thirty-six rods; thence south sixteen degrees east, to the section line; thence along said line to place of beginning, containing in all sixty-

three and eighty-seven hundredths acres, more or less [except a strip, belt or parcel of land twenty-five feet wide and running entirely around the premises above described next to the line above indicated and within the enclosure formed by the lines above indicated and described.]

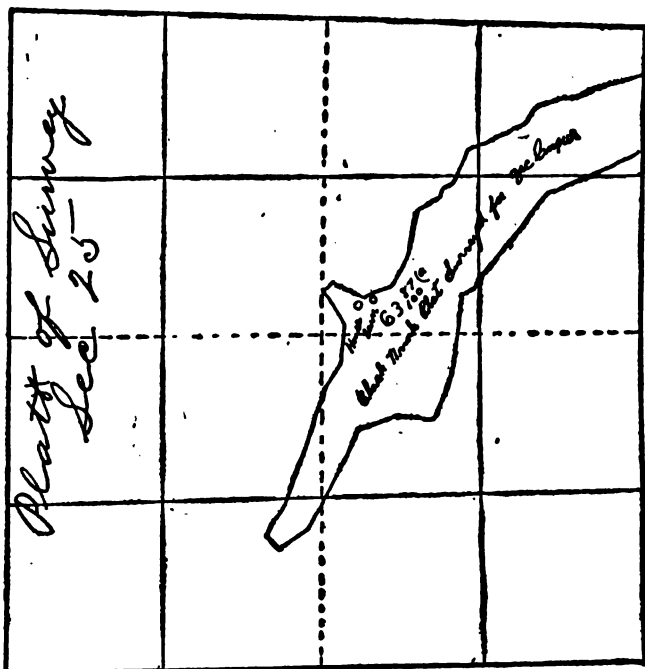
“And the defendant further avers that he has been in open, notorious, hostile, adverse, exclusive, uninterrupted, visible, actual and continuous possession of each and every part of the above described lands from the second day of March, eighteen hundred and eighty-four, until the present time, and during all and every part of that time has claimed to be and has been the absolute owner of said land in fee simple and has claimed the same hostile to and adversely to the pretensions of the plaintiff herein and his grantors and all persons whomsoever.”

Upon the trial of this cause the plaintiff introduced a clear record title vesting title in him, commencing with letters-patent from the Government, dated November 29, 1870. There being no dispute as to the clear record title of the plaintiff to the land in controversy, we deem it unnecessary to set forth in detail the patent and deeds conveying the property. Plaintiff then rested his case and defendant introduced testimony as follows:

W. N. Lett testified, substantially: As deputy county surveyor I surveyed and platted the land in question and occupied by defendant in section 25, running the lines approximately with his crooked rail fence, surveyed lines being straighter than the fence; in some places running outside the fence and in others inside the fence. My plat does not represent the fence, in which there are many bends and turns; but the lines are so averaged, that about the same number of acres are in the survey as in the fence. He has had his fence there enclosing the field, house and stable, to my knowl-

edge, about eight years; it was spoken of in the neighborhood as Cooper's place on Granny's branch. I saw nothing to distinguish it from other places occupied by squatters; never heard about any particular claim he set up to it; I deviated from the fence in making the survey and plat, both inside and outside, but the general run of the enclosure is approximately with the lines as surveyed and platted; the land I surveyed runs at an angle through the section and goes into eight of the forties, as the plat shows; extends about a mile diagonally, running from southeast to northwest direction generally, covering about 63.97 acres, but I can't tell how much land there is in any one of the forty acres Government tracts; cannot accurately describe the land inside the fence enclosure; it is very irregular; but I don't think I surveyed any line more than twenty-five feet outside the fence itself, but cannot be positive; part of my survey was where there was no fence, but where fence appeared to have been sometime before; I had to go by what seemed, and what I was told, as to what was and had been fenced. The plat as made by this witness is hereto attached.

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Mart Cowan testified, substantially: I assisted the surveyor, Mr. Lett, in making the survey he has platted and told about, and I know the way Cooper's fence runs on this section twenty-five; know Cooper has been there in possession nineteen or twenty years, and had this land as a claim. It is known as Cooper's, but I have not heard of any particular title claimed by him; don't know about the title; but he claimed the land all the time, so far as I know; he was living on it and cultivating and improving it; he never had any sort of title to it that I know; he only claimed it as his claim; lived there and used it as his home; I had an idea he had the best right to it, better than anybody else in the county as a claim; never heard Cooper say anything about it. As to the survey, the furthestest

distance at any point this survey ran outside of the fence was not over twenty steps—about twenty steps from the fence on the outside; possibly the distance deviated from the fence about sixty feet on a straight line; there was one place I suppose was twenty-five steps, it would not average over fifteen feet. I never knew of any change in the attitude of Cooper; his possession was always just the same.

Gus Cowan testified, substantially: I helped survey this land Cooper is on; he has lived there eighteen or nineteen years and does yet; I supposed it railroad land; he has about thirty-five acres cleared and under fence; a log house and a log barn; I reckon he claimed it as his own all the time; that's as far as I know. He never said what sort of claim he had; he just said it was his; he did not say how or what title; I guess he had as much right as any one; it is generally called railroad land; he claimed the improvements and had the land under fence.

Fred Wooley testified, substantially: I know this land where Cooper lives; has always been called Zach Cooper's place for eight or nine years, but never heard him say so.

Zach Cooper, defendant, testified, substantially: "Q. Tell the jury where you live. On this land in controversy? A. I got Mr. Lett to survey this land last August. I went on that land March 2, 1884; if I count right it will be twenty years the 2d day of March coming. When I first went there it was laying there in the woods, nothing only just a little strip of rocky hollow, and I can tell you my reason for going there. When I come to this country I had been blind eighteen months until I couldn't see to work, I wasn't able to buy a place and Charley Matterson had this place and another place and he says to me, 'If you want that place you can just go on it,' and I went on it and have been there ever since. So I went to work and cleared up

this land and have been there ever since, and never a man claimed that land or ever asked me to get off the land or nothing else, until this thing come up a year ago last spring, I think. Well, sir, I never have measured it any more than the surveyor. I went and got them men to survey my place, and I told him I want to know just what I had in cultivation, and want to survey it and get me a plat of what I had in cultivation, and he went to work and surveyed it and give me a plat of it, and he said there was sixty-three acres. I claimed to be the owner of the place.

"Q. How long have you claimed to be the owner of the place? A. I have claimed to be the owner of the place nineteen years the 2d day of March.

"Q. When did you first find out that was not Government land? A. I don't know whether I have found it out yet or not. I haven't been around trying to find out what kind of land it was.

"Q. And didn't you tell Mr. A. W. Noel that you went on there thinking it was Government land? A. No answer.

"Q. Do you know Mr. Noel? A. I don't know.

"Q. A. W. Noel? A. If I ever told anybody it was Government land I have forgot it.

"Q. What other title did you have? A. I just had a right and a title to that place; I was given the place by Charley Matterson, and I went on it and improved it when it was not worth ten dollars.

"Q. Charley who? A. Matterson.

"Q. Did he claim to own the land. A. He told me, he says, 'I have got a claim and will give it to you.'

"Q. You understood that was a claim to Government land? A. No, sir; he didn't say so. It has been a good while ago and I couldn't say what it was.

"Q. Been too long ago to tell? A. Yes, sir.

"Q. You didn't buy it from him? A. No, sir.

"Q. Didn't pay him anything? A. No, sir.

"Q. Didn't promise to pay him anything? A. No, sir.

"Q. You don't claim to have bought the land from him or anybody else? A. No, sir.

"Q. You simply thought because you was living there and improving that place and using the land, after so long it became yours? A. I thought I had the best right to it to anybody else.

"Q. What did you base that claim of right on? A. I had possession of it, and told you three or four times that Mr. Matterson gave it to me, then I went ahead and improved the place and put everything on the place that is on it, and I think I have got more right there than anybody else, and I think that entitles me to the land, and that is what my title is.

"Q. That is the land you have got fenced. A. Yes, sir.

"Q. That is what you had surveyed out there? A. Yes, sir.

"Q. You gave directions to the surveyor about where he should run his lines? A. I gave him directions. I told him to run them lines, that I wanted to know exactly what my improvements took in.

"Q. Did you see him make the lines? A. Yes, sir.

"Q. Did you see where he run the lines? A. Yes, sir; I was along with him most of the time, but I didn't have anything to do with the survey.

"Q. You had him testify here? A. Yes, sir.

"Q. And also heard his testimony? A. Yes, sir.

"Q. You heard the testimony of the man who carried the chain? A. Yes, sir.

"Q. They were correct about the way the lines run there with reference to the fence? A. Yes, sir; I guess they told it about as near as they could.

"Q. You have never listed this land for taxes or paid taxes on it. A. No, sir.

"Q. Never did at any time? A. No, sir.

"Q. How about this conversation with Mr. Puckett? A. Well, sir, I will tell you all the conversation Puckett and I ever had about the land, as far as I know. Mr. Puckett come to me when I was first notified, and they read the summons to me to attend court; and it seems to me . . . I don't know anything . . . I don't know much at best; but I says to him, I says, 'If I was on your land,' says I, 'why didn't you tell me or come and notify me something about it, why sue me?' And he says, 'We wanted to perfect the title,' and he didn't want possession; and he says, 'There is such a law, if a man stays on a piece of land, and is in peaceable possession ten years, it gives title to the land.' He was the man that told me about that law of ten years giving me a title to the land.

"Q. What do you know about this statement to W. E. Smith about it being Government land? A. Well, sir, I talked with Smith lots of times, first about one thing and then another; what I said to Smith about the Government land, I don't know anything about it. The way the lines run and the way they are cut up there, I didn't know how the lines run. I just fenced along the branch the best I could to get a little piece of land, and there was part of my fence that run off onto Government land, and there was eight or ten acres above where this survey was made that is on Government land, I suppose.

"Q. Up to the time this answer was filed, January a year ago, had you ever had this land surveyed up to this time? A. No, sir, I never had. I did not know where the line was.

"Q. You never had heard the land described at that time? A. No, sir, I hadn't; I didn't know what land it was, so far as that was concerned."

Here the defendant rested his case in chief. Whereupon the plaintiff offered the following instruction in the nature of a demurrer to the evidence of defendant:

"The court instructs the jury that the defendant has not proved occupancy of any particular and definite part of the land in question, susceptible of designation and survey; that the documents in evidence establish paper title in the plaintiff, and the finding must be for the plaintiff."

Which demurrer was by the court overruled and instruction refused. To which action and ruling of the court in overruling said demurrer the plaintiff then and there objected and excepted at the time.

Plaintiff introduced further testimony as follows: O. R. Puckett testified: "Q. Tell the jury what, if any, conversation you had with the defendant in this case with regard to ownership or title to this land in controversy or any of it. A. Prior to the institution of this suit, as representative of the plaintiff in this case I called on Mr. Cooper, in company with Joe Edwards, at the time he served the summons in a prior proceeding involving this same controversy, and I asked Mr. Cooper in regard to the nature of his claim, and he told me that Mr. Wadkins, who has represented the plaintiff as local agent here, had approached him concerning the land and his occupancy of it; and I asked with reference to leasing the land, and he said he gave Mr. Wadkins no positive reply in regard to his intention; and since he had talked with Mr. Wadkins he had made some inquiry around and had been informed that ten years' possession of land gave him title, and he didn't believe we could get possession, in view of the fact he had been in possession of it for ten years or more; and for that reason he refused to take a lease. I asked him how he came to get in possession of it and he said he merely moved onto it; it was vacant land, unoccupied

land; thought it was Government land at the time; but said after he had been on there awhile he heard it was railroad land; and he also said he heard among his neighbors that there was some litigation between the railroad company and the Congress of the United States, and that he understood the railroad had procured the land by fraud, and he didn't know but what, in the course of those proceedings, the title of the railroad company would be voided by Congress, and, if so, the land would revert back to the Government, and he expected to enter it as his homestead. I had two or three talks with him of the same import. This was in December at his home on this land."

A. W. Noel testified: "Q. Do you remember having had a conversation with Mr. Cooper at or about the bringing of this litigation between him and the legal owner of this land, concerning the title and the character of his possession of it? A. I heard him talking. I didn't do any of the talking; he was not talking to me. Q. Who was he talking to? A. Judge Smith. Q. You heard the statement? A. Yes, sir. Q. Tell the jury the language as near as you can? A. The substance of it was he went on there thinking it was Government land."

Charles Matterson testified:

"Q. Where do you live? A. State of Missouri, county of McDonald.

"Q. Where do you live with reference to the place now occupied by Zach Cooper. A. It was about a mile and a quarter north.

"Q. You are well acquainted with Zach Cooper? A. Yes, sir.

"Q. Do you know when Cooper took possession of the land he now occupies? A. I remember the fact of his taking possession of it. It was about twenty years ago.

“Q. You remember the fact of his taking possession of it? A. Yes, sir.

“Q. State under what circumstances, and what conversation you had with him at the time? A. To the best of my recollection it was about that time. I laid the foundation for the house on the place at first myself, then went and found me a piece of Government land to homestead, to make me a home out of it, and I run the sections there the best I could and I supposed it to be railroad land. There was a general talk all over the whole country that it was railroad land, every odd section, and the way the sections run I took it to be an odd section.

“Q. What did Zach Cooper say to you about it at that time? A. He settled on the place up there.

“Q. How come him to settle on the place? A. He had to leave the place where he was living, and he was out of a home, and he just moved up there I suppose and took a claim on the land.

“Q. What conversation did you have with him just before he moved on the place? A. I told him if he wanted to move on the claim, that I would just give him all the right and title I had to it and make him a quitclaim deed to it.

“Q. What right and title did you tell him you had? A. I told him I didn't have any right to it.

“Q. What else did you tell him about the title at that time. A. I told him I understood it was railroad land; that was the general talk of mighty near all the people, that every odd section was railroad land throughout the county, and that was section twenty-five, the best I recollect about it.

“Q. And Zach Cooper has been living there ever since? A. Yes, sir.

“Q. What has been the general talk throughout the neighborhood with reference to the title of the land during the time Zach Cooper had been living on it,

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as to its being Zach Cooper's land or railroad land? A. Some says it is railroad land and some says it is Cooper's land, so it was kind of mixed; a good many said he had lived on it long enough with peaceable possession of the land that it give him title to the land.

"Q. That is the reason they say it is Zach Cooper's now? A. Yes, sir; because he has had possession so long.

"Q. That is the general talk about the character of his title? A. Yes, sir.

CROSS-EXAMINATION.

"Q. You told Mr. Cooper what right, title and interest you had in it you would turn over to him and make him a quitclaim deed any time he wanted it? A. No, sir; I didn't say any time; I said I could make him a quitclaim deed to it; I didn't have any title at all; the land didn't belong to me. I laid the foundation for a house.

"Q. You offered to make him a quitclaim deed to it if he wanted it? A. I said I could make him a quitclaim deed of it, but I didn't have no title to it or no claim on it any more.

"Q. From that time? A. Yes, sir.

"Q. You didn't have any surveyor with you or anything of that kind? A. No, sir.

"Q. You don't know whether you had the lines right or not? A. I wasn't over there when Mr. Cooper had it surveyed.

"Q. He has lived on it about twenty years? A. Yes, sir; twenty years the 2d day of March.

"Q. He has claimed that land ever since that time? A. Yes, sir.

"Q. His possession of it has been open and notorious, and he has cultivated it and claimed it as his

own? A. He has cleared it up and cultivated it every year.

“Q. He was there in open possession where everybody knew where he was and what he was claiming, so far as you know? A. Yes, sir.

“Q. By you telling him you had no title to it you meant you had no deed to it? A. No, sir; no deed to it at all.

“By Mr. Puckett: Q. And no claim to ownership? A. No, sir; no claim to it at all.”

Again at the close of all the evidence the plaintiff in effect requested the court to instruct the jury to find the issues for the plaintiff, which was again denied by the court, to which action of the court the plaintiff then and there objected and excepted at the time.

At the close of the evidence the court instructed the jury; however, we deem it unnecessary, with the views we entertain upon the testimony in this cause, to reproduce such instructions. The cause being submitted to the jury upon the evidence and instructions of the court they returned a verdict finding the issues for the defendant as to the land particularly described in the answer of the defendant. Upon this verdict the court rendered a judgment in which it was adjudged that the defendant have and recover and hold the premises as heretofore described in the answer. Timely motions for new trial and in arrest of judgment were duly filed and by the court overruled, and from the judgment rendered in this cause the plaintiff prosecuted this appeal and the record is now before us for review.

OPINION.

It is manifest from the record in this cause that there is but one legal proposition for our consideration, that is as to the sufficiency of the testimony introduced by the defendant to authorize the court to submit the

issues of the Statute of Limitations to the jury. That the plaintiff was the owner and had a clear record title to the land in dispute there can be no question, and unless there was substantial evidence tending to show that the defendant was holding the land adversely to the true owner and everybody else for the statutory period, then clearly it was the duty of the court to have directed the jury to find the issues for the plaintiff. The law upon the subject of adverse possession is nowhere more clearly stated than in *Hunnewell v. Burchett*, 152 Mo. 611. It was there said by this court, speaking through *BURGESS, J.*, that "the law . . . presumes that every possession is rightful and consistent with, not in opposition or 'adverse' to, title and ownership. A party, therefore, who relies upon 'adverse possession,' in order to rebut this presumption of possession consistent with the title of the real owner, must prove his possession to be 'adverse' to the title set up (*Jackson v. Sharp*, 9 Johns. 163; *Ld. Raym.* 329); that is, he must show the actual knowledge of the real owner that he claims in opposition to, and defiance of, his title, or he must show such an occupancy and user, so open and notorious, and inconsistent with, as well as injurious to, the rights of the true owner, that the law will authorize, from such facts, the presumption of such knowledge by the true owner. It is not the mere occupancy or possession which must be known to the true owner, to prejudice his rights; but its 'adverse character.' [*Alexander v. Polk*, 39 Miss. l. c. 755.]" The rule announced in that case was approved and followed in the recent case of *Missouri Lumber & Mining Co. v. Jewell*, 200 Mo. 707.

We have read in detail all of the testimony introduced respecting the claim and possession of the defendant to the land in controversy and have fully set forth such testimony in the statement of this cause, and we deem it sufficient to say upon this proposition

that the testimony absolutely fails to show such a state of facts as would authorize this court to hold that the defendant had acquired title to any part of the land in controversy by reason of the running of the Statute of Limitations. We are unwilling, confronted with the facts disclosed in this record, to hold that the defendant had acquired title to this land; to do so, in our opinion, would be to extend the rules of law applicable to that subject, and encourage parties who have no claim whatever upon lands belonging to others, to adopt methods of acquiring title that cannot be justified either upon moral grounds or upon sound legal or equitable principles. The defendant in this cause testified in his own behalf, and when all of his testimony is considered and measured by the rule as announced in *Hunnewell v. Burchett*, supra, it absolutely fails to make out such a case of adverse possession as to defeat a recovery by the true owner of the land. His testimony when boiled down amounts to about this: He says, "I thought I had the best right to it to anybody else," and that he thought he had more right there than anybody else, and that he thought that entitled him to the land, and he finally says, "that is what my title is." He further testified that up to the time the answer was filed in this cause he had never had the land occupied by him surveyed; that he didn't know where the lines were; and to the question as to whether or not he had ever heard the land described at that time, he answered, "No, sir, I hadn't; I didn't know what land it was, so far as that was concerned." The record further discloses that he never pretended to have this land listed on the assessment books, and had never paid any taxes upon it.

We see no necessity for extending the discussion of this question any further. We are unwilling to further extend the rule respecting the Statute of Limitations and announce under the testimony of the defend-

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ant himself that he had acquired title to this property. This conclusion is reached without considering the testimony offered by the plaintiff upon this subject, which clearly indicates that the defendant regarded this land as Government land; at least, witnesses testify respecting conversations with him in which he said that he thought it was Government land, and while the defendant has no recollection of any such conversation, he by no means undertakes to deny that he had them.

The judgment in this cause should be reversed and the cause remanded with directions that the circuit court enter a judgment for the plaintiff for the recovery of the land in dispute, and it is so ordered.

All concur.

S. CARP v. QUEEN INSURANCE COMPANY et al.,
Appellants.

Division Two, April 2, 1907.

1. **EVIDENCE: Files of Court: Originals: Certified Copies.** The affidavit and information and other original instruments filed in a criminal cause in the circuit court, identified by one who speaks of his own knowledge of their authenticity, such as the prosecuting attorney, are evidence. The fact that the statute (sec. 3135, R. S. 1899) makes "copies from the records, attested by the clerk, with the seal of the court annexed," evidence, is no reason why the original papers and records when fully identified should not be received as evidence. But a better method would be to call the clerk of the court and have him identify the files and records of which he is the lawful custodian.
2. ———: **Agent: Insurance Company: Adjuster.** The fact that a certain person who authorized the posting of a reward for the capture of an incendiary was an agent of one of the defendant insurance companies cannot be established by the declaration of the man himself that he was the company's agent. And the fact that such person afterwards acted as adjuster for the com-

pany in adjusting the loss which grew out of the fire will not prove that he was its agent at the prior time when the reward was posted.

3. **MALICIOUS PROSECUTION: Arson: Posting Underwriter's Reward: Agent.** Plaintiff sues seven insurance companies for the malicious prosecution of himself for arson, which he alleges was brought about by them. Evidence was offered that soon after the fire a reward for the capture of the incendiary was posted by the Board of National Underwriters. *Held*, that the connection of that board with the defendants is not shown by the fact that the adjuster of one of the companies sent the notices and furnished the money with which the poster was paid, nor was the burden on the companies to show that they had no connection with the underwriters.
4. ———: **Loss of Business.** Plaintiff alleged that he had been greatly embarrassed and defamed and caused to suffer great anxiety of mind and lost much time and incurred and unnecessarily expended large sums of money in his defense against the malicious prosecution. *Held*, that evidence that prior to his arrest he had earned fifty dollars a month, that for the six months thereafter his time was occupied in trying to defend himself, and that he spent \$62 for depositions and \$150 for attorneys, was clearly within the allegations, and that it cannot be said he had no business whatever.
5. ———: **Pleadings in Another Suit: New Objection.** Appellants' objection, urged in this court for the first time, that petitions, answers, stipulations, judgments and verdicts in the suits on the insurance policies were incompetent because they were proceedings had after the institution of the criminal suit out of which grew this suit for malicious prosecution, cannot be considered on appeal.
6. ———: ———: **Identification.** Besides, such pleadings were competent as original papers, if identified by some witness who could testify of his own knowledge that they were the original files in that case; and the attorney for the plaintiff in that case may be such a witness.
7. ———: ———: **Subsequent Civil Proceedings: Probable Cause.** Where the purpose of encouraging or maintaining a criminal prosecution was to avoid a civil liability, the pleadings and proceedings in the civil suits against the defendants on their insurance policies, although begun subsequently to the criminal prosecution, are competent evidence in the suit for malicious prosecution to show that purpose and a lack of probable cause.
8. ———: ———: **Motive: Interest: Policies: Verdict.** The petitions, answers and replies filed in the civil suit on the policies issued by the defendant insurance companies are compe-

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tent in the suit for malicious prosecution for arson against the same companies, to show the motive they had in the prosecution. The policies are also competent as tending to show the interest which the companies had in commencing and assisting in the continuance of the prosecution of plaintiff, although they covered stocks of goods owned by plaintiff's brother for whom plaintiff was a clerk. But the verdict and judgments are not competent evidence.

9. ———: **Due Diligence to Discover Pertinent Facts.** At the trial of a suit against insurance companies for having maliciously instituted a prosecution against plaintiff for arson, plaintiff was permitted to testify that Miss Williams, in the trial of a civil suit on the policy of one of the defendant insurance companies, had testified that she lived next door to plaintiff and while the fire bell was ringing the night of the fire (about midnight) she saw plaintiff go through his front gate towards the fire. This testimony was admitted on the theory that due diligence required defendants before instituting a prosecution against plaintiff to have made inquiries of his next door neighbors, and if they had done so Miss Williams would have informed them that the testimony of the State's witnesses that plaintiff was present at the fire immediately before the bell rang and was seen standing in the shadow of the building after the bell rang, was untrue. The information in the criminal prosecution was filed in May, 1902, and the case was tried in July, and Miss Williams' testimony was given in November in the trial of the civil suit. *Held*, that this testimony was hearsay, and was not admissible in chief under the rule laid down in *Stubbs v. Mullholland*, 168 Mo. l. c. 76. Nor was the testimony of Miss Williams herself competent on any such theory — that is, to show that defendants were chargeable with a lack of due diligence in not having obtained it before the prosecution was begun.
10. ———: **Testimony of Witness at Criminal Trial.** It is competent for plaintiff in the suit for malicious prosecution, who was present at the trial of the criminal case and heard a witness testify, to state what was the witness's testimony at that time.
11. ———: **Agent's Effort to Get Testimony: Estopped to Deny Agency.** The testimony of a witness that an agent of the defendant insurance companies offered him money to get, and otherwise endeavored to get, information from his daughter for the prosecution of plaintiff, is competent. And the fact that such person testifies that he was not the agent of the defendants, but acted voluntarily, without compensation, does not disprove his agency. If he busied himself to get information against plaintiff, and reported it to defendant's attorney and he and the prosecuting attorney in large measure acted upon his advice and instituted the prosecution, he is estopped to deny that he was defendants' agent.

12. ———: **Insurance Companies: Value of Goods Burned: Competency of Clerk.** A young woman who had for four years been a clerk in the store where the insured goods were burned, had helped to make an invoice of them shortly before the fire, and had had fifteen years experience as a clerk in like stores, is competent to testify as to the value of the stock of goods. And where she was a witness in the criminal trial, inquiries then of her as to the value of the goods and the amount of the invoice would have been obviously relevant, and hence she would likewise be competent to testify as to the same matters in the suit for that malicious prosecution.
13. ———: **Evidence of Plaintiff's Guilt.** A defendant in a case of malicious prosecution may show the guilt of the plaintiff by any evidence in his power, even though discovered after the prosecution began or after it ended, and notwithstanding plaintiff was acquitted.
14. ———: ———: **Plaintiff May Disprove His Guilt.** Where the defendants in the suit for malicious prosecution tender as a defense plaintiff's guilt of the criminal charge, it is competent for the plaintiff in rebuttal to disprove the evidence offered by the defense for that purpose—in this case, by showing that the witnesses for the defendants were either mistaken or had falsely sworn to his presence at the burning building at the time testified by them by evidence that he was at his home on the night of the fire and did not start to the fire until after the fire alarms were sounded.
15. ———: **Contradicting Witness: Deposition.** It is competent for plaintiff to read the deposition of a witness taken by plaintiff in another suit for the purpose of contradicting the evidence which the witness gives in behalf of defendants in the suit on trial.
16. ———: **General Reputation.** In a suit for malicious prosecution, plaintiff may (where the criminal charge was arson) prove his good reputation for business integrity and honesty in the community in which he resided prior to the commencement of the criminal prosecution. Likewise may defendant prove his bad reputation. But the evidence on that point must not be mere hearsay of instances of supposed wrongdoing, but must go to his general reputation in some particular community.
17. **REPUTATION: Based on Witness's Opinion.** The general reputation of a witness cannot be based on another witness's transactions with him; and an answer that the general reputation of a witness is bad, based on the dealings of the witness with him, should be stricken out.

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18. **MALICIOUS PROSECUTION: Defendants' Connection Therewith: Demurrer to Evidence.** Plaintiff was prosecuted for arson, and the case after a mistrial was voluntarily dismissed, and he sued the seven insurance companies which carried insurance on the goods burned, for having instigated the prosecution, and at the trial they asked for a peremptory instruction on the ground that the evidence did not show that they instigated or carried on the prosecution. The prosecuting attorney testified that he was not employed or requested by the defendants or their agents to file the affidavit; that the affidavit was made by one Musgrove, and that he filed the affidavit and information honestly believing plaintiff started the fire and that the evidence Musgrove gave him was sufficient to convict, and that he so stated at the time. The evidence further shows that the prosecuting attorney received his impressions and formed his conclusions of plaintiff's guilt from statements made to him by Musgrove and other witnesses secured by him; that before he filed the information, Musgrove had consulted an attorney and besought his assistance in the prosecution; that the affidavit was drawn by this attorney, and signed by Musgrove, at the attorney's request; that this attorney assisted in the prosecution from the commencement of the case until its dismissal, and that he was paid for his services by the accredited agents of defendants; that, while Musgrove denied that he was acting as the agent of the defendants in seeking evidence and urging the prosecution against plaintiff, they accepted those services and acted upon his advice and employed the attorney to prosecute plaintiff on the charge of arson; that the only parties interested in the prosecution were the defendants, who were seeking to avoid their policies on the goods burned; that a few days after the fire and before Musgrove became so active in his search for incriminating testimony against plaintiff, one Welch, an adjuster for all the defendants except one, was in the city of the fire, sent for plaintiff and his brother who owned the stock of goods, and assumed to represent defendants as adjuster and examined them as to the amount of the loss, and in the presence of a witness in the office of the local agent expressed the opinion that plaintiff had burned the store, and that he would send the United States marshal to arrest him, and that plaintiff ought to be in the penitentiary. *Held*, first, that defendants are estopped from denying that Musgrove was their agent; second, that the evidence was ample to show the connection of defendants with the instigation and carrying forward of the prosecution.
19. ———: ———: ———: **Advice of Counsel: Agent's Disclosure of All Evidence.** In this case it was for the jury to determine whether Musgrove, the agent of defendants, who swore to the

affidavit and gave to the prosecuting attorney the information upon which the prosecution was based, disclosed all the facts within his knowledge, or which were easily ascertainable by him, touching plaintiff's connection with the fire, to the prosecuting attorney and defendants' counsel; and hence the court was not authorized to take the case from the jury under the rule that, where defendants truthfully disclose all the facts within their knowledge to competent counsel and are advised that there is probable cause for the prosecution, they are not liable.

20. ———: Probable Cause. Probable cause is a mixed question of law and fact. Where the facts are undisputed, it is for the court to declare their legal effect; where they are disputed, it is for the jury to determine the question under proper instructions. And where there is testimony showing that no probable cause for the prosecution existed, or where there is evidence which impeaches defendants' testimony and tends to show it to be unreliable, the question is for the jury. The court should not assume the absolute truth of the testimony of defendants' witnesses.
21. ———: ———: Instruction: False Testimony. The court instructed the jury that "notwithstanding you may believe from the evidence that there was sufficient evidence produced at the trial of the criminal case against plaintiff as defined to you in other instructions, yet, if you further believe from the evidence that any material part of the evidence introduced against plaintiff in said criminal case was false, or was known to be false by defendants or either of them or their agents or servants, and that said false testimony was procured or connived at by defendants or either of them or their agents, then the jury would be warranted against such defendant or defendants, in finding that there was no probable cause for said prosecution, and that the same was malicious." *Held*, not to assume that there was false testimony given against plaintiff, nor to hold defendants liable for an unauthorized act of their agents, but was well enough.
22. ———: Defendants' Connection Therewith: Instruction. Defendants' connection with the prosecution of the criminal case does not have to be proven by direct and positive evidence, but may be established by facts and circumstances from which it may be reasonably inferred.
23. ———: Instruction: Acts of Agent: Advising Prosecution: Continuing, etc. An instruction which directs the jury that if "defendants or either of them by their servants or agents wilfully, maliciously and without probable cause, did aid, advise or procure an information to be filed . . . or did wilfully,

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maliciously and without probable cause, aid, abet and advise the continuance of said prosecution after the filing of said information by their servants or agents," etc., does not hold the defendants liable for the acts of their servants regardless of their authority from defendants, and the use of the words "advise the continuance of said prosecution" was not improper when taken in connection with the words "aid, abet and advise," nor is the instruction otherwise erroneous.

24. ———: ——— Probable Cause: Malice: Advice of Counsel: Damages. Instruction on probable cause, on the advice of counsel, on malice and on the measure of damages, actual and punitive, in a suit for malicious prosecution, are set out in the opinion, and *held*, to be correct.
25. ———: At Instance of Prosecuting Attorney: Instruction. Where the evidence demonstrates that the prosecution against plaintiff was not begun by the prosecuting attorney of his own motion, but was instigated by defendants' agents and attorney, an instruction which tells the jury that their verdict must be for defendants, if the prosecution was begun and maintained by the prosecuting attorney of his own motion, and without any request or procurement on the part of defendants, should not be given. Instructions should be based on the state of the case which the evidence justifies. (*Distinguishing White v. Shradski*, 36 Mo. App. 635, where said instruction upon a different state of facts was proper.)
26. ———: Beginning Prosecution. Defendants may be liable in a civil suit for malicious prosecution notwithstanding they did not begin the prosecution; they are liable if they maintained its continuance or aided and abetted it until its end, with malice and without probable cause.
27. ———: Disagreement of Jury in Criminal Trial: Probable Cause. The disagreement of the jury in the trial of the criminal case does not constitute reasonable grounds for a belief that defendant therein was guilty, and is not evidence of probable cause in the civil suit for malicious prosecution, and does not constitute a circumstance from which the jury may infer that such prosecution was with probable cause.
28. ———: What Constitutes Beginning of Prosecution? An instruction which undertakes to tell the jury that the information and not the affidavit filed by the agent of defendants was the beginning of the prosecution against plaintiff, is out of place and should not be given where the prosecution was induced by the affidavit and statements of defendants through the affiant and the advice of defendants' attorney and maintained by defendants until the prosecution ceased.

29. ———: **Excessive Verdict.** The amount of damages in a civil suit for malicious prosecution is largely a question for the jury, and their verdict should not be held by the appellate court to be excessive unless the court can say it was the result of prejudice, passion or malice.
30. ———: ———: **Elements.** Mental pain and anxiety caused by the disgrace accompanying the prosecution, the humiliation and danger from a prosecution for a grave criminal offense, the jeopardy in which plaintiff was placed, are elements of damages; and besides, disgrace is a relative term, varying in its effects upon different men, and dependent upon many conditions—all of which are matters for the jury.
31. ———: ———: **Self-Serving Evidence.** Testimony of a witness that after plaintiff's arrest he went around hanging his head and acting as if he was in deep trouble and not in his right mind, is not proper to prove damages from anguish and the disgrace suffered. It opens too wide the door of self-serving testimony.

Appeal from Christian Circuit Court.—*Hon. Asbury Burkhead*, Judge.

REVERSED AND REMANDED.

Edward J. White, Martin L. Clardy and Barger & Hicks for appellants.

(1) Incompetent and illegal evidence was permitted to be introduced by plaintiff over defendants' objection and exception. (a) All the testimony of W. O. Oldham, relative to the existence and objects of the National Board of Underwriters, and his information of its business and methods, shown by him to be wholly derived from what he had been told by others, was purely hearsay and incompetent. *Greenl. Ev.*, sec. 98; *Chouteau v. Searcy*, 8 Mo. 733; *Atkisson v. Castle Garden*, 28 Mo. 124. (b) The unverified and uncertified files and records of the circuit court of Lawrence county, were incompetent, because not properly authenticated by the certificate of the clerk of the county court from whence they came. *R. S. 1899*, sec. 3135; *Greenl. Ev.* (14 Ed.), sec. 502; *Crow, Hargadine & Co. v. Stev-*

ens, 44 Mo. App. 140; Gentry v. Field, 143 Mo. 409; Hickman v. Griffin, 6 Mo. 37; Moyer v. Lyon, 38 Mo. App. 635. (c) The act of the court in admitting the declarations of the alleged adjusters of defendants for the purpose of establishing their agency, and the acts and declarations of such illegally established agents, was manifest error. Craighead v. Wells, 21 Mo. 404; Anderson v. Vollmer, 83 Mo. 403; Waverly Co. v. Coöperage Co., 112 Mo. 383; Stove Co. v. Furniture Co., 93 Mo. App. 237; Oil Co. v. Zinc Co., 98 Mo. App. 324; Diel v. Railroad, 37 Mo. App. 454. (d) The posting of the reward, by the National Board of Underwriters, not shown to be connected in any way with a single one of the defendants, was illegal evidence. Diel v. Railroad, 37 Mo. App. 458; Smith v. Ins. Co., 107 Cal. 432; Atkisson v. Castle Garden, 28 Mo. 124. (e) The evidence of the injury from the prosecution to the business of plaintiff was incompetent, not only because all the evidence showed that plaintiff never had any business in Aurora, but also because no injury to his business—if he had had any—was alleged as a basis for such special damages. 13 Ency. Pl. and Pr., 453; Fine v. Navarre, 104 Mich. 93. (f) The petitions, answers, judgments and verdicts in the suits on the policies, even if they had been properly authenticated, and verified, were incompetent and illegal evidence in this case, and only tended to the further prejudice of defendants' rights. The suits on the policies were not tried until six months after the criminal suit, and the issues were wholly different. Kennedy v. Holladay, 25 Mo. App. 515. (g) The statements of the assets of the several defendants, not shown to have been issued by them, or to have been authorized by them, and the evidence set forth therein, was incompetent and prejudicial. Evidence of the wealth of defendant in such cases is held to be admissible, but it must be confined to proper evidence of such facts and limited by proper inquiry to

legal evidence. *Newell, Mal. Pros.*, p. 604; *Spear v. Hiles*, 67 Wis. 350. (2) (a) The court erred in overruling defendants' demurrer offered at the close of plaintiff's evidence and again at the close of the whole case. *White v. Shradski*, 36 Mo. App. 635; *Babcock v. Mer. Exch.*, 159 Mo. 381; *Newell, Mal. Pros.*, sec. 7, p. 108; *Warren v. Flood*, 72 Mo. App. 199; *Smith v. Ins. Co.*, 107 Cal. 432; *Engelke v. Chouteau*, 98 Mo. 629; *Boden v. Railroad*, 84 S. W. 181; *Leigh v. Webb*, 3 Esp. 164; *Hahn v. Schmidt*, 64 Cal. 284; *McNeeley v. Driscoll*, 2 Blackf. 259; *Newman v. Davis*, 58 Iowa 447; *Armstrong v. Railroad*, 46 La. Ann. 1448; *Bartlett v. Brown*, 6 R. I. 37; *Shea v. Lumber Co.*, 92 Minn. 348; *Black v. Buckingham*, 174 Mass. 102; *Bell v. Railroad*, 58 N. J. L. 227; *Strehloe v. Pettitt*, 96 Wis. 22. (b) The evidence connecting plaintiff with the burning of the store was sufficient, as a matter of law, to have justified the court in holding that the prosecution was based upon probable cause, and for this reason the demurrer should have been given. *Meysenberg v. Engelke*, 18 Mo. App. 346; *Taaffe v. Kyne*, 9 Mo. App. 15; *Pandjiris v. Hartman*, 196 Mo. 539; *Johnson v. Miller*, 63 Iowa 529. (c) The demurrer should also have been sustained because of the total lack of evidence showing any malice upon the part of defendants against plaintiff. *Vansickle v. Brown*, 68 Mo. 627; *Jordan v. Railroad*, 105 Mo. App. 446. (3) The court erred in giving instructions 1, 2, 3, 4, 5, 6 and 7, and each and every one thereof, on the part of plaintiff. *Fox v. Smith*, 55 Atl. 689; *Herbener v. Crossman*, 55 Atl. 223; *Ruth v. Railroad*, 98 Mo. App. 1; 13 Ency. Pl. and Pr., 435; *Vansickle v. Brown*, 68 Mo. 627; *Jordan v. Railroad*, 105 Mo. App. 446; *Boden v. Railroad*, 84 S. W. 181; *White v. Shradski*, 36 Mo. App. 635; *Warren v. Flood*, 72 Mo. App. 199; *Babcock v. Merchants Exchange*, 159 Mo. 381; *Slater v. Kimbro*, 91 Ga. 217. (4) The court erred in refusing instructions 1, 2, 3 and 4, and each thereof,

asked by defendants. *White v. Shradski*, 36 Mo. App. 640; *Johnson v. Miller*, 63 Iowa 529; *McCaskey v. Garrett*, 91 Mo. App. 354. (5) The damages found by the jury were grossly excessive and the result of passion and prejudice. *Ruth v. Railroad*, 98 Mo. App. 19; *Farrell v. Railroad*, 103 Mo. App. 454; *Chitty v. Railroad*, 166 Mo. 435.

H. H. Bloss, McNatt & McNatt and G. A. Watson
for respondent.

(1) (a) Where one offers the same sort of evidence, he waives any objection he might have had to its offer by the other side, and the rule would certainly apply with greater force where he offers the evidence first, of which he complains. *Ruth v. Railroad*, 98 Mo. App. 1; *Dice v. Hamilton*, 178 Mo. 81; *Strother v. DeWitt*, 98 Mo. App. 293. (b) The statute was passed for public convenience, to enlarge the means of evidencing public instruments. Our courts have held that the original as well as a copy are admissible. *Ohmeyer v. Ins. Co.*, 91 Mo. App. 189; *Van Riper and Rogers v. Morten*, 61 Mo. App. 444; *Reynolds v. Ins. Co.*, 88 Mo. App. 679. The case of *Hickman v. Griffin*, 6 Mo. 37, cited by appellant to support this contention is opposed to it. The court held that the affidavit was not identified and was not a certified copy and should have been excluded. If it had been identified it would have been admissible. If this objection relates to the original bills of exceptions read from, then we answer that appellants themselves used the bills of exception and besides the stipulation in respondent's additional abstract which appellants failed to copy in their abstract, authorized the reading of them. (c) The next alleged error assigned by appellants relates to the evidence admitted showing declarations of adjuster of defendants for the purpose, as appellants allege, to prove

the agency of the adjusters. If the record showed that there was no other evidence to show the agency of the adjuster for defendants, then we concede the assignment would be well taken, but this record is full of other evidence showing the relation between defendants and their adjusters. *Chase v. Rusk*, 90 Mo. App. 25; *Bonner v. Lisenby*, 86 Mo. App. 666; *Parsons v. Ins. Co.*, 132 Mo. 583. The adjuster is the *alter ego* of the insurance company and his admissions made at the time of examining the loss are the admissions of the company. *Sisk v. Fire Ins. Co.*, 95 Mo. App. 695; *Branigan v. Ins. Co.*, 102 Mo. App. 70. (d) Where the evidence shows that the purpose of encouraging or maintaining criminal proceedings is the enforcement of the avoidance of a civil liability, the motive for such conduct is shown to be malicious. *Stubbs v. Mulholland*, 168 Mo. 47; *Meysenberg v. Engelke*, 18 Mo. App. 346; *Stanley v. Turner*, 21 Mo. App. 251; *Eagleton v. Kabrick*, 66 Mo. App. 231; *Clark v. Thompson*, 160 Mo. 461. (e) The evidence of Miss Williams was properly admissible for several reasons. It developed the existence of testimony prior to the beginning of this prosecution that was accessible to defendants and their agents if they had wanted to honestly determine the probable guilt of Mr. Carp. *Stubbs v. Mulholland*, 168 Mo. 47; *Thomas v. Smith*, 51 Mo. App. 605; *Eagleton v. Kabrick*, 66 Mo. App. 231; *Proctor Coal Co. v. Moses (Ky.)*, 40 S. W. 681; *Pedan v. Mail*, 118 Ind. 560; 19 Am. and Eng. Ency. Law (2 Ed.), 698; *Ruth v. Railroad*, 98 Mo. App. 19. (2) Before a defendant in a malicious prosecution case can shield himself behind the advice of counsel, he must establish that he disclosed all the material facts, truthfully and honestly, which he knew or by the exercise of reasonable diligence could have ascertained, and that he relied upon the advice of counsel, in good faith, believing the plaintiff to be guilty of the crime. *Stubbs v. Mulholland*, 168 Mo. 47; *Sharpe v. Johnston*,

76 Mo. 669; McIntyre v. Leverny, 148 Mass. 546. Where a prosecution is conducted by reason of a false affidavit or carried on by introducing false testimony, this of itself is sufficient proof of want of probable cause. Sharpe v. Johnston, 76 Mo. 672; Firer v. Lowery, 59 Mo. App. 96; Boogher v. Hough, 99 Mo. 183. And even if a person is convicted, if it was done by false testimony or unfair means, there is no probable cause. Womack v. Circle, 32 Gratt. 324; Adams v. Bickwell, 126 Ind. 210. Even if there was no evidence of ill-will, the fact that defendants were trying to evade the payment of a civil obligation, and that this would bring about the proper results should they secure a conviction, is sufficient evidence of malice. Meysenberg v. Engelke, 18 Mo. App. 346; Eagleton v. Kabrick, 66 Mo. App. 231. (3) If the testimony was found to be false by the jury (which it certainly was) and defendants aided in procuring it, then they should be made to suffer in damages for their wrongful attempt to use the criminal courts to defeat a contract liability. Sharpe v. Johnston, 76 Mo. 672; Firer v. Lowery, 59 Mo. App. 96; Womack v. Circle, 32 Gratt. 324. (4) While it may be true that the second refused instructions is a literal copy of the one approved in the case of White v. Shradiski, 36 Mo. App. 640, still, if the instruction would not conform to the issues or the facts in this case, there could be no error in refusing it. (5) The amount of the damages in malicious prosecutions, where there is proof of all the elements of damage, as in this case, is solely for the determination of the jury. Chapman v. Dodd, 10 Minn. 350; Hiatt v. Kincaid, 28 Neb. 721; Marks v. Hastings, 101 Ala. 165; 19 Am. and Eng. Ency. Law (2 Ed.), 702. Cases where verdicts were sustained on appeals in amounts ranging as large or larger than the one in this case as based on facts more in keeping with the case at bar: Railroad v. Gehr, 66 Ill. App. 173; Rawson v. Leggett, 90 N. Y. Supp. 5,

97 App. Div. 416; Railroad v. James, 10 S. W. 744; Railroad v. Talbot, 131 Ind. 231; Cuthbert v. Galloway, 35 Fed. 466; Clark v. American Dock, etc., Co., 35 Fed. 478.

GANTT, J.—This is an appeal from the judgment of the circuit court of Christian county, wherein S. Carp recovered judgment against the Queen Insurance Company of America and others for \$12,500 as damage for malicious prosecution.

The action was commenced on January 17, 1903, in Lawrence county. A change of venue was granted the defendants to Greene county and the circuit court of Greene county granted the plaintiff a change of venue to Christian county. The cause was tried in the last-named county, at the August term of the court, and resulted in a verdict for the plaintiff and judgment accordingly.

The petition in substance alleges that the seven insurance companies, defendants herein, are each and every one foreign corporations engaged in the business of fire insurance in this State, and are liable to be sued herein; that the defendants on or before the — day of May, 1902, in the county of Lawrence and State of Missouri, falsely and maliciously and without any reasonable or probable cause, procured and caused to be made an affidavit charging the plaintiff with the crime of arson in setting fire to and burning a certain stock of goods, wares and merchandise, in said affidavit described, and belonging to one H. Carp, situated in Lawrence county, Missouri, and on or about the same day caused the same to be filed in the circuit court of Lawrence county, Missouri, and by reason of said affidavit, a State's warrant was issued, charging the plaintiff with the said crime of arson. The plaintiff states that afterwards, to-wit, on the — day of May, 1902, he was by the consent and procurement of defendants arrested

under said warrant and was compelled to give a good and sufficient bond for his appearance at the next regular term of said Lawrence Circuit Court. Plaintiff further states that after his arrest, to-wit, on the — day of November, 1902, the plaintiff appeared before the said circuit court of Lawrence county, the day on which plaintiff was bound by law to appear to answer said charge of arson, and at said last above date, the State of Missouri refused longer to prosecute plaintiff for said charge and the plaintiff was by the said circuit court fully discharged from further appearing or answering to said charge of arson, and the prosecution of plaintiff for said crime of arson is now at an end.

Plaintiff further states that during all of said times referred to and each and every act done in the prosecution of the plaintiff for said crime, the defendants acted with malice towards plaintiff, and actively participated in the prosecution of plaintiff for said false charge from its beginning until plaintiff was fully discharged, and that said prosecution was conducted without any reasonable or probable cause, but for the purpose of vexing and harassing the plaintiff for their financial benefit. Plaintiff says that by reason of said arrest and malicious prosecution, plaintiff has been injured in his reputation, greatly embarrassed and defamed, and has been caused to suffer great anxiety of mind and has lost much time, and has incurred and necessarily expended large sums of money in his defense in said prosecution, and has otherwise been greatly injured to his actual damage \$10,000, and plaintiff says that by reason of defendants' malicious action and their unlawful and vexatious purpose in prosecuting and harassing plaintiff and in view of the wealth and standing of both plaintiff and defendants, the defendants should be punished for their unlawful action, and plaintiff asks that he may recover in addition to his actual damages \$15,000 as punitive or exemplary

damages, for both of which he asks judgment and his costs.

The defendants filed a joint answer, which consisted of a special denial of each and every material allegation in the plaintiff's petition, and then for a further defense, they allege that the said defendants and each of them upon information and belief, say that the said affidavit and information filed against the said plaintiff and referred to in the petition, was filed by the informant therein named under the advice of the prosecuting attorney of Lawrence county, Missouri, and after the affiant, one John Musgrove, had given to said prosecuting attorney a full and fair statement of all the facts known to said Musgrove, and that said prosecuting attorney on May 31, 1902, on his knowledge, information and belief, and upon his oath of office, made and filed in said court his affidavit informing the circuit court of Lawrence county, State of Missouri, that on the 29th day of January, 1902, one S. Carp did willfully, unlawfully and maliciously set fire to and burn a certain house located in the city of Aurora, Missouri, belonging to one J. R. Woodfill, Jr., of the value of five thousand dollars, and at the same time and place did willfully, maliciously and feloniously set fire to and burn a certain stock of goods therein belonging to one H. Carp, and of the value of four thousand dollars, a copy which said affidavit of said prosecuting attorney is hereto attached and made a part hereof, and that on said affidavit and information of said prosecuting attorney alone, the alleged said warrant was issued, under which plaintiff was arrested and prosecuted as alleged in his petition, and that there was reasonable and probable cause for the filing of said affidavit and information, but the defendants and each thereof denied that they or either of them had anything whatever to do with the filing of either said affidavit or information and aver that said affidavit and information were filed

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and the said warrant issued and plaintiff arrested without the procurement or knowledge of these defendants or any of them, and that neither they nor any of them had any thing whatever to do with the alleged prosecution of the plaintiff. The said answer concluded with a general denial of each and every allegation in the petition.

The plaintiff filed a reply denying all the new matters pleaded by the defendants.

The evidence tends to show the following facts:

The plaintiff, S. Carp, prior to and on January 29, 1902, resided in the city of Aurora, Lawrence county, Missouri, and had general charge and supervision of a stock of goods in said city belonging to his brother, H. Carp, who resided in St. Louis. The building in which said stock of goods was kept, belonged to J. H. Woodfill, Jr., and was known as Number 117 Olive street in said city. The stock of goods was insured against damage by fire in the sum of eight thousand dollars, by the insurance companies, who are defendants in this cause. Harry Carp, a tailor in St. Louis, had begun this business in Aurora in 1897, and placed his brother in charge of said stock with full power to carry on the business, purchase and sell the goods, sign all papers, draw checks, etc., for which he paid him fifty dollars per month salary. The evidence tends to show that sometime in the year 1900, Harry Carp, the owner of said stock of goods, bought another stock known as "The Fair" from Mrs. Dr. Harding. He purchased this stock at sixty-five cents on the invoice price, or for four thousand and eight hundred dollars. For a while these two stores were kept in separate places, both being managed by the plaintiff S. Carp, and each store was separately insured for three thousand dollars. In September, 1901, the two stores were united under one roof, and the several insurance policies transferred so as to cover the united stock. Harry Carp, the owner,

from time to time visited Aurora, and while there in January, 1902, and while his clerks were invoicing the stock, took out another policy of insurance to the amount of two thousand dollars on the stock and fixtures, for the reason alleged by plaintiff that the invoice showed \$12,000 worth of goods in stock and only \$6,000 of insurance, and because there had been several attempts to burn a large hotel across the street from the store. On the night of January 29, the store building in which this stock of goods was kept was burned, and the stock was nearly a complete loss, only about three hundred dollars worth of goods being saved. On the 28th of May, 1902, John Musgrove, a resident of Aurora, made and signed an affidavit charging the plaintiff, S. Carp, with having maliciously and feloniously set fire to and burned said store house belonging to J. R. Woodfill, Jr., and the goods, wares and merchandise therein situated belonging to H. Carp, with the intent then and there to defraud, damage and prejudice the Queen Fire Insurance Company and the other insurance companies named as defendants in this cause, and alleging that said goods, wares and merchandise were then insured to the said H. Carp against loss and damage by fire in the sum of eight thousand dollars by the said insurance companies, the defendants herein. It further appears from the testimony of Isaac V. McPherson, Esq., the prosecuting attorney of Lawrence county in 1902, that Musgrove, soon after the fire, gave him the names of witnesses whom he had found, and detailed to him, the prosecuting attorney, the facts which the said witnesses had told Musgrove they would swear to, tending to prove that the plaintiff S. Carp was guilty of arson in setting fire to and burning said building and stock of goods, and Mr. Conner also gave the prosecuting attorney the name of other witnesses. Mr. McPherson testified that he talked to those wit-

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nesses and afterwards, on the 28th of May, Musgrove made the affidavit above referred to. That affidavit he testified was drawn in the law office of E. J. White, Esq., and was written on a typewriter by Mr. White at the dictation of Mr. McPherson and was sworn to by Musgrove afterwards on the 31st day of May. Mr. McPherson prepared the information wherein he charged "upon his knowledge, information and belief that the plaintiff willfully, unlawfully, maliciously and feloniously set fire to and burned the said house and stock of goods." This information was verified by Mr. McPherson as true according to his best knowledge, information and belief, and was filed in the office of the circuit court of said county on the 31st of May, 1902. At the July term, 1902, the plaintiff was put upon his trial in the circuit court of Lawrence county on the charge of arson, and there was a mistrial as the jury disagreed.

John Cockran, a witness for the defendants, testified that the jury took a number of ballots and that they were eight to four for conviction, or nine to three on the first ballot; on the last ballot, they stood either seven to five or eight to four for conviction; the highest number of votes the defendant received was six or seven, and he thinks that on one ballot there was only two for acquittal. Frank Mitchell, another of said jurors, testified, on behalf of the plaintiff, that he was the clerk of the jury and on the first ballot there were four for conviction and eight for acquittal; that his recollection was that on one ballot they stood ten for acquittal and two for conviction; this was the highest number the defendant ever received. He thinks they stood six to six when they were discharged.

At the November term, 1902, the civil case of H. Carp against one of the insurance companies on his policy of insurance on said stock, was tried in the circuit court of Lawrence county,

and on the trial of that case Miss Blanche Williams testified on behalf of the plaintiff, Carp, and gave testimony tending to prove that he left his home on the night of the fire, after the fire bells had been rung, and tended to contradict the evidence given in the criminal case tending to show that the plaintiff was down at the store room just before and at the time that the fire was discovered. At this same November term, the prosecution for arson was set down for trial and the State was not ready for trial, and it appears that the counsel for the defendant therein, the plaintiff herein, was insisting that the case be tried or dismissed. Mr. McPherson testified that on the day this case was set for trial, which was the day after the civil trial on the policy, the judge of the circuit court spoke to him and asked him if he had been present and heard Miss Williams' testimony in the civil case, and he told him that he had not, and the judge said that he had heard her testimony, and in his judgment it was very strong and would likely secure an acquittal of Mr. Carp. He knew how many witnesses there were, and it would be piling up a big bill of costs against the State, and he would have his stenographer read to the prosecuting attorney the testimony of Miss Williams upon that trial on the policy, that in his judgment it would be futile to try the case again. Thereupon the prosecuting attorney had the stenographer read the testimony of the witness to him, and after hearing it read, he nolleed the case. He testified, "I was asking that the case be continued, and Mr. Carr McNatt was insisting that the case be disposed of in some way at that time, either tried or entirely wiped out, and that is the way we fixed it." Mr. Bloss, another of plaintiff's counsel in the arson case, also asked that the case either be tried or nolleed entirely at that time.

While upon the stand, the prosecuting attorney, Mr. McPherson, testified as follows: Q. "Now were

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you employed by the insurance companies to file that affidavit?" Ans. "I was not." Q. "Were you requested by any of the insurance companies or their witnesses or representatives of any kind?" Ans. "I was not." Q. "Did you receive any letters requesting you to do so?" Ans. "I never, or never had any communication." Q. "Did you file that affidavit and consider it an act of your own will, honestly believing that he started that fire?" Ans. "I did from the evidence given to me. I had consulted and had had statements given to me by persons in whose honesty I relied, of all the witnesses that I had reason to believe knew anything of this fire." Q. "When you filed that affidavit informing the court on your information and behalf and on your oath of office that he started this fire, did you not believe then that the evidence that you had in your possession was sufficient to convict him of the crime?" Ans. "Yes, sir." Q. "State whether or not you heard Mr. Musgrove at the time he made his affidavit, which has been introduced in evidence, that what was stated would be sufficient if proven, and you believed the testimony was sufficient for a conviction, and whether you advised him that the information that he gave you was sufficient to warrant the prosecution and probable conviction?" Ans. "I advised Mr. Musgrove, at the time he made this complaint, that I believed the testimony that he was giving me and what I had from other persons, was sufficient on Mr. Carp to show his guilt, and that he could be convicted, and would be on the trial."

The plaintiff offered in evidence a copy of an offer of reward of two hundred and fifty dollars by the National Board of Underwriters for the detection, conviction and punishment of the party or parties who should be found guilty of arson in setting fire to the premises containing the stock of dry goods owned by H. Carp, on the 29th of January, 1902. To the intro-

duction of this offer of reward, the objection was two-fold, first, that it was not the best evidence, and, second, because there was no evidence tending to connect the defendants or either of them with the said offer. The objection was overruled and the defendants excepted. The said reward was offered by the National Board of Underwriters, signed by H. K. Miller, secretary of the executive committee, and purported to have been offered by order of the executive committee, the two hundred and fifty dollar reward to be paid upon the conviction of the person found guilty of arson in burning the premises containing the stock of goods owned by H. Carp on the 29th of January, 1902. In regard to the first objection, it appeared from the testimony of Mr. Minor that he was a resident of Aurora through the year 1902 and was engaged in bill-posting as a part of his business, and that he posted the rewards above mentioned; that they were given to him by John T. Ragsdale, who paid him for posting the same; that he posted them about thirty days after the fire, and thinks there were about fifty of the offers of reward posted. He testified that the bills that were posted had all been destroyed by the weather and for that reason none of the originals could be produced. He could not testify to the contents of the bills and did not know how they were signed. They were posted by his bill-posters.

The testimony offered by the plaintiff to connect the defendants with the National Board of Underwriters, and its or their offer of reward, consisted, first, of the testimony of O. W. Oldham, who as a witness for the plaintiff, stated that he lived in Springfield and had resided there for about twenty years, and was engaged in the insurance business and as bureau inspector of the insurance agents and as an adjuster; he was asked from his experience in the insurance business, whether he was acquainted with the National Board of

Underwriters of New York City, and what relation they sustained to the insurance companies, the defendants in this case. Preliminary to answering this question, the court permitted counsel for the defendants to examine the witness. He testified that he did not know whether the underwriters association was a corporation or not, nor whether it was a stock company or not. Had never been in their office and did not know who the officers of the company were. He had been in the habit of getting a letter from Mr. Miller once a year, but he did not know whether he was an officer or not. All that he knew about Miller's relationship to any insurance company was what he had heard other insurance agents in Missouri say. He did not know anything about the relationship of the underwriters association and its officers to any insurance company. Thereupon the defendant objected to Oldham testifying and answering the question of the plaintiff. This objection was overruled and the defendants duly excepted. The substance of his testimony was that about once a year he got a letter from Mr. Miller asking witness to furnish statistics in regard to his field of insurance; he never observed any of the transactions of the underwriters association except that once in a while they offered a reward for an incendiary. The underwriters did not do any insurance business to his knowledge. He did not know that the underwriters association was a combination of insurance companies; he had no knowledge or recollection of their offering a reward for any losses of any particular insurance company. In this connection the plaintiff also offered John Ragsdale, who testified that he lived at Aurora and at the time of the fire, and at the time he testified, he was agent for the Hartford Insurance Company, The Commercial Union, Fireman's Fund and the Hanover Fire Insurance Company of New York; that he did not offer any reward, but he gave some printed

slips offering a reward to Lewis Minor, and handed the money to pay for the same to another gentleman in Aurora, who gave it to Mr. Minor to pay for posting the same; that he got these notices of reward either out of the mail or by express from Mr. Tebbitts of Kansas City to pay for posting the same; Mr. Tebbitts was a special agent for the Hartford Insurance Company. On cross-examination, he stated that he had probably seen Mr. Tebbitts a half dozen times. The home office of the Hartford Insurance Company had never sent him a statement that Tebbitts was their agent. The only way he knew he was their agent was from his own statement that he was. At this point, the defendants moved the court to strike out the answer of the witness that Tebbitts was the special agent of the Hartford, on the ground that it was incompetent hearsay and not the best evidence; the agency could not be established by the agent's declaration, which motion was overruled, and defendants excepted. He testified further that he did not have one of the rewards in his possession. No reward was sent by the Hanover Insurance Company, or the Commercial Union or the Hartford or from either of the home offices or general agencies of either of the defendant companies. Tebbitts did not come into the office and hand him any rewards to put up; the witness never knew of him putting up such rewards, or requesting any one else to do so. On redirect examination the witness was asked if Mr. Tebbitts had not been acting as agent for the insurance companies in their losses that occurred in Aurora, and he answered, "I do not believe the Hartford had any other loss except one, and he wrote him about that." That loss was adjusted by Mr. Welch, and Tebbitts wrote him concerning it.

Plaintiff also offered James Wilson as a witness, who testified that he lived in Aurora at and prior to the time of the fire, and that on or about the first of Febru-

ary, 1902, he was in the office of Mr. Ragsdale one Saturday and heard a conversation between a Mr. Welch and Mr. Ragsdale. At that time he did not know Mr. Welch, but Mr. Ragsdale has since told him that the man who was in his office talking to him at that time was Welch. He was asked to state what Mr. Welch said. To this question the defendants objected, because it was a conversation not material to the issues in this case, and in the next place there was no evidence tending to show that Mr. Welch was agent for the companies who are now sought to be bound by the testimony of the agent of one defendant only; that before Mr. Welch's declarations could affect them, it should first be shown that he was their agent and had authority to make declarations called for by the question. The objection was overruled and the defendants excepted. The witness thereupon proceeded to state that Mr. Welch came to Mr. Ragsdale's office and went through the latter's insurance books the first thing. Ragsdale was representing several companies in Aurora. Welch went out and stayed a little while and then came in again and said he had seen Mr. Carp. He did not stay but a few minutes, but got some copies of the books, he went out again, and was not gone long until he came back; witness was still there. Welch said, "Carp has burned his store, G— d— him," and "as soon as he, Welch, got back to Kansas City, he would send the United States marshal down to get him. He ought to be in the penitentiary." The defendants moved to strike out the answer to the last question because it was simply a declaration of what Welch intended doing himself. The motion was overruled and the defendants excepted. Witness understood Welch to say that he was representing all the companies that had any loss except one. The defendants objected to the last question and moved to strike out the last answer for the reason that the fact was attempted to be established by

the uncorroborated statement of the agent alone, was incompetent as affecting the rights of the defendants, and for the reasons mentioned in the previous motion, and for the further reason that this testimony which was admitted under stipulation from a deposition taken in another case was not really covered by the stipulation for the reason Judge Neville in the civil case, after its introduction, struck it out. The motion to strike out was overruled and the defendants excepted.

Plaintiff next offered in evidence the answer of the defendant companies in former cases on the insurance policies, submitting to arbitration of insurance difference between defendant companies and H. Carp, for the purpose of connecting the two adjusters. To this offer the defendants objected that the arbitration papers signed in May did not tend to prove that Welch had authority to make this declaration in February; that he was an adjuster there for the purpose of finding out, inquiring and getting information of the value or damages; that the fact that Welch was authorized in the matter to sign the agreement to submit the amount to appraisers did not tend to prove that he had authority from the defendants to arrest this man, or that he was qualified with authority in the matter to prosecute under the terms of the policy. By the court: "It might have a tendency to prove that he was agent for the companies, I will let it go in for what it is worth." Defendants further objected that the papers offered had not been shown to be the answer of the defendants. The only way to verify the record is to bring in a certified copy under the seal of the clerk. The court overruled the objections, and the defendants excepted. And thereupon the plaintiff read the answers of the defendants. In the third paragraph of said answer, the defendants pleaded a stipulation in the policy as follows: "In the event of disagreement as to the amount of loss,

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the same shall as above provided be ascertained by two competent and disinterested appraisers, the insured and this company, each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their difference to the umpire and the award in writing of any two shall determine the amount of such loss." The plaintiff then introduced in evidence an agreement for submission to appraisers by and between H. Carp and Hamburg Bremen Fire Insurance Company of Germany and such other insurance companies who may sign this agreement to Sol Jonas of Aurora, Missouri, and M. A. Potts of Kansas City, Missouri; together with a third person who shall first be chosen by them to act as an umpire on the differences only between the appraisers herein named to estimate and appraise at its true cash value immediately before the fire and the direct or immediate loss and damage caused by fire which occurred on the 29th of January, 1902, property partially or totally destroyed and owned by H. Carp, etc., signed by the Hartford Insurance Company by C. E. Tebbitts, the American Union Association Company, Firemen's Fund Insurance Company, Queen Insurance Company, Hamburg Bremen Fire Insurance Company, by Milton Welch, Adjuster, and by H. Carp, dated May 14, 1902, and a blank agreement for umpire between the said appraisers, which was never executed.

The plaintiff then introduced Solomon Jonas as a witness, who testified that he did not know Milton Welch or C. E. Tebbitts; he knew S. Carp before the fire and had known him about two years. He was then asked if he had noticed any difference in the business prospects of S. Carp after the charge of arson and the trial of S. Carp thereon. To this evidence the defend-

ants objected until it was shown that plaintiff had some business. The objection was overruled. Counsel for defendants then said: "Is it not a fact that these policies were issued to H. Carp and not to Sam Carp, and the business conducted by Sam Carp, he is conducting in the name of his wife, and so Sam Carp never did do business in his own name there before, or since the fire? Is not that true, Mr. Bloss?" Mr. Bloss, "No, it is not true, the business was conducted in the name of H. Carp, we are willing to concede that. This man certainly has some occupation, and if he was injured this witness should be permitted to tell it." The objection was overruled and defendants excepted. The witness then proceeded to state that he noticed quite a difference in plaintiff's business prosperity before and after the trial; a great many people began to think the man was guilty from representations made on the streets after he was arrested, but a great many people thought well of him until he was arrested. Certainly it reflected on his business. Witness was then asked if he noticed any evidence of mental worry as a result of the trial, to which defendants object as not a proper element of damage, but the court admitted the evidence and the witness stated that the plaintiff went around hanging his head down as if in great trouble. On cross-examination he stated that the plaintiff was now conducting a business at Aurora, but he did not know in whose name it was being conducted. He did not know that plaintiff's residence property was in his wife's name, he did not know that he had failed in business in East St. Louis.

John McNatt was sworn for the plaintiff; he testified he was a member of the bar and had been connected with the criminal and civil cases in this Carp litigation as an attorney from the beginning until now. He identified paper offered in evidence as the answer of the defendants filed in the circuit court of Lawrence

county. Counsel objected to the identification of the pleadings because not certified, but the court overruled the objection and admitted the pleadings as originals.

There was much testimony on the part of the plaintiff in regard to the fire and as to the presence of the plaintiff herein at that fire and as to the indebtedness of H. Carp to the Bank of Aurora. This evidence tended to show that the stock of goods of H. Carp in the building that was burned approximated the value of ten to twelve thousand dollars.

The plaintiff offered himself as a witness and testified, among other things, that he knew Milton Welch, that he was an adjuster for the fire insurance companies which had policies on the stock of H. Carp, and that Mr. Welch came to Aurora shortly after the fire and sent over to the store to see Harry Carp; the plaintiff went with Harry Carp to the hotel to see Mr. Welch, and Mr. Welch said: "I wanted to know of your fire," he was an adjuster, and Harry gave him a statement of the stock, invoice, etc. He inquired how much the sales were and how much we owed. He afterwards met Mr. Welch at Monett and asked him what he was going to do about the loss, and he said that "H. Carp's rights would have to come into the court." The losses were not settled, a suit was brought on all the policies. Plaintiff testified that he made an invoice prior to the fire and was assisted by Miss Sue and Pearl Harper; that the invoice amounted to eleven thousand dollars. He testified that the additional two thousand dollars was taken because of a fire in a hotel, which was only twenty-two feet distant from their store. This additional insurance was taken about two weeks after the hotel fire. He testified to the mental worry and anxiety he suffered from the criminal prosecution. Prior to the fire his earning capacity was fifty dollars per month and for the succeeding six months he did not do anything to earn any money, but his time was taken up

defending himself. His expenses in collecting evidence was sixty-two dollars for depositions, and one hundred and fifty dollars attorney fees. He was cross-examined as to his actions and whereabouts on the night of the fire. He testified that he failed in business in 1893 in St. Louis, and assigned his goods for the benefit of his creditors and they got paid in full. He was asked if he was at Bald Knob, Arkansas, and he testified that he traveled through there, but never did any business there. He went by the name of S. Carp there. He testified that the business he was now in at Aurora belonged to himself and his wife, but was in her name. He testified that Mr. McPherson, the prosecuting attorney, and Mr. Edward White prosecuted him in the criminal trial. He testified that Mr. White was helping the insurance companies. Mr. White appeared for the State in the taking of depositions in the criminal case. Mr. White also testified in the criminal case at the instance of the defendants.

Plaintiff also offered in evidence the testimony of Mr. Edward J. White taken in the circuit court of Lawrence county, Missouri, at the July term, 1902, in the case of the State v. Carp, to which the defendants objected because the witness was present, and it could not be used as impeaching testimony because Mr. White had not been put upon the stand. The court overruled the objection, and the plaintiff read in evidence a portion of the evidence of Mr. White in the deposition, which was in effect that the witness identified an affidavit of John Musgrove to be in the witness's handwriting; the affidavit was made on witness's typewriter by witness himself, and interlineations in pen and ink were by himself, and that he asked Musgrove to make the affidavit.

The plaintiff then called Mr. White as a witness who testified in substance as follows: That he was employed by Mr. Barger to assist in the defense of several

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insurance companies in the several cases of H. Carp against them. "A short time after the fire, the present sheriff of Lawrence county, Mr. Conner, who was a political and personal friend of mine, came to my office and told me of the evidence against Mr. Carp. He stated that he had burned the store, and Musgrove came to my office and told me there was going to be a reward offered and wanted me to help out in the suit and wanted to employ me on his behalf, to cross-examine the witness and enter the case, conditionally, that is, for a part of the reward they offered; they gave him such evidence as to lead him to believe he would be convicted, that is the first part I took in the prosecution of Mr. Carp." Witness received a telegram asking him to appear while depositions were being taken at Mr. Bloss's office. "I was rather backward about entering the case for this reason: you were taking depositions in the case of State v. Carp and Conner came and told me you were taking these depositions, and I told him I did not want to enter an appearance in that case; that I had no authority to appear for the State, and he said, 'I will get you authority, this underwriters association have offered a reward and I will get you some authority.' He said he was going to wire the secretary and he went off and brought me a message after that, but who it was from, I do not remember. I went up and cross-examined the witnesses at your office, Mr. Bloss, but it is my recollection it was in the State case. I got a telegram from Mr. Hicks of the firm of Barger and Hicks." Deposition was shown to the witness, and thereupon he stated that notice appeared to have been in the case of H. Carp against the American Insurance Company. "I see from that I was mistaken. I was paid for my services in the criminal case. After I had tried the insurance case in November, the question of my service came up and Mr. Welch talked to me and said that I

ought to be paid, but he had no authority to employ any one, but he said, you have assisted here and if Mr. Conner does not pay you, I will. I was paid one hundred dollars by Mr. Barger after the trial in the several cases and Mr. Welch indicated or promised to pay me fifty dollars as a personal fee, and I received fifty dollars for my assistance in the other case from Mr. Barger. My first employment by any of the insurance companies was in November, 1902; the plaintiff had instituted a suit in June that was afterwards dismissed. My name was not signed to this answer, and I was not employed prior to November by the insurance companies.

Plaintiff also offered F. L. Harper as a witness who testified to Musgrove offering to pay him for any information he could get from his daughter, who formerly clerked for Carp. He did not understand that Musgrove wanted to corrupt him, but simply wanted him to assist in getting up the evidence against Carp. Musgrove was looking up the evidence in the criminal case and was willing to pay him for his services.

Plaintiff also offered in evidence the various insurance policies, to which the defendants objected, but the objection was overruled and the defendants excepted and the policies were read to the jury.

Plaintiff also offered all the pleadings in the case to which the policies were attached, to which the defendants objected, but their objections were overruled and defendants excepted. Plaintiff also offered the evidence as to the capitalization of the several insurance companies, the defendants in this case, and then rested. Thereupon the defendants offered a demurrer to the evidence which was by the court overruled. The defendants then formally made a motion to strike out various items of evidence, particularly the statements of Mr. Welch, the evidence of Ragsdale as to the receiving and posting of the rewards, the affidavit and warrant, and information in the criminal case, and the

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evidence of the plaintiff Carp in relation to the alleged reward, which motion was overruled and the defendants excepted.

The defendants then offered evidence of John Horn, John Musgrove, Lewis McKeet, Dave Smith, J. H. Zumbrunn and Thomas Loy, tending to show plaintiff's guilty connection with the fire which destroyed the stock of goods, and tending to impeach and contradict the testimony offered on behalf of the plaintiff as to the occurrences at the fire and the whereabouts of plaintiff on that night. Defendants also offered Peter McGannon as a witness, who testified that he had been a merchant in Aurora since 1891, and in a general way was familiar with H. Carp's stock of goods and the old Harding stock, and that he would consider six thousand dollars a fair invoice for that stock at the time of the fire. Also the evidence of Mr. John Horn and Eliza O. Quinn tending to show that the plaintiff Carp was around the building in which the stock of goods was situated that night, and at the back door after eleven o'clock that night just before the fire was discovered in the store room, and tending to disprove the evidence of the plaintiff and Miss Blanche Williams, that plaintiff was at home after the fire broke out and only went to the burning building after the fire alarm was given. Defendants also offered evidence of T. H. Loy to the effect that the general reputation of James Wilson, a witness for the plaintiff, for truth and veracity was not good, which testimony on motion of the plaintiff was stricken out and taken from the jury over the objection and exceptions of the defendants. And also the evidence of Tate Baufman, who testified that he was a carpenter, and repaired the Carp store room after the fire; that plaintiff had the key and refused to allow him in until six weeks after the fire; that he found a five gallon coal oil can in there down under the burned dry goods and shoes. "Carp would not allow us in until

the insurance companies had seen the goods; there was also about a half wheel barrow full of burned kindling wood lying around there; the oil can had not exploded but was empty; there was some holes burned in the store room about five feet away from the stove, but no holes in the floor near the stove." With this the defendants rested their case.

In rebuttal the plaintiff offered in evidence the deposition of John Musgrove taken in the case of H. Carp against the Commercial Union Insurance Company, to which the defendants objected because it had not been taken in the State case nor in the case in which the plaintiff was a party, and because it was not competent to contradict the witness thereby because the whole deposition was not called to his attention while he was on the stand, which objections were overruled and the deposition read in evidence. Plaintiffs also offered in evidence the testimony of John Musgrove in the case of H. Carp against The Hamburg Bremen Fire Insurance Company taken at the trial at Springfield, to which the defendants objected, but the objection was overruled and the evidence of the witness read to the jury. Plaintiff also offered the evidence of A. G. Keim, who testified that he was a real estate and insurance agent and that prior to the fire on January 29, 1902, plaintiff's general reputation in the community in Aurora for truth and veracity and business integrity and honesty was good; that since the fire it is not good; that he carried insurance on the building which plaintiff occupied and his company ordered him to cancel the policy and would not carry it so long as he kept the building. Defendants moved to strike out these answers, but the objection was overruled and defendants excepted. Plaintiff also offered the testimony of Miss Blanche Williams as contained in the bill of exceptions of H. Carp against The Queen Insurance Company, to

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which the defendants objected because if offered for the purpose of showing want of probable cause it was not rebuttal testimony, but evidence in chief, and for the additional reason that Miss Williams was not a witness in the criminal cause at all and her evidence was not known either by the State or the defendant until months after that trial and could throw no light upon the proceedings had in the criminal case. The objections were overruled and Miss Williams' testimony was read. Plaintiff then offered the evidence of J. O. Davis tending to show that Mr. Carp, the plaintiff, did not arrive at the fire until after the witness reached the fire and did not object to opening the door of the store room, but tried to open it. Plaintiff also offered the evidence of M. T. Davis, cashier of the Bank of Aurora, and who had been the general manager of the Aurora Mercantile Company for four or five years, who testified that he was well acquainted with the stock of goods of H. Carp, was in his store every few days; that he was in there about a week before the fire. He held a note that H. Carp owed Dr. Harding, for collection. The note was past due about three months, and witness went to the store to collect it. Witness looked over the stock of goods for the purpose of satisfying himself about the value of it. The store was full of goods, some of the goods were of good values and some were cheap. In the opinion of the witness, the stock was worth about ten thousand dollars. When he called he held three notes of one hundred and fifty dollars past due. The face of the notes unpaid with interest was about two thousand dollars; that in addition to that, he owed the bank of witness about four hundred dollars outside of that. Plaintiff said he owed about eleven hundred dollars outside of this indebtedness amounting to about thirty-five hundred dollars. Witness had little interest in seeing the plaintiff recover; thought

he would get his four hundred either way the case went. So far as the other notes were concerned, he had ample security outside in the shape of a mortgage on real estate. As to the three hundred and fifty dollars on the past due notes, the plaintiff came to the bank and gave witness a check on the St. Louis bank for the amount before the fire. This check was paid in the regular course of business. Plaintiff also offered in evidence the testimony of Miss Susie Harper, who had clerked for plaintiff for almost five years prior to the fire, and helped take the stock once a year. She and her sister, Miss Pearl Harper, assisted in taking the stock just before the fire. She had had fifteen years' experience in clerking and during that time had handled stocks of goods. In her opinion the stock of goods was worth from ten to twelve thousand dollars.

This was the substance of all the testimony. Other facts and the instructions of the court will be considered in the examination of the assignments of error.

I. It is first insisted that the court erred in admitting illegal and incompetent evidence offered by the plaintiff, and it will be necessary to discuss the several items of evidence *seriatim*.

First, it is insisted that the testimony of W. O. Oldham relative to the existence and objects of the National Board of Underwriters was incompetent. As to this evidence it is sufficient to say that the witness knew nothing and testified to nothing which could in the most remote degree have been injurious to the defendants and could in no possible manner have been prejudicial.

Second, it is next urged that the court erred in admitting unverified and uncertified files and records of the circuit court of Lawrence county, because not properly authenticated. What specific records are referred to in this assignment is a matter of conjecture. If the objection relates to the affidavit of John Musgrove

charging the plaintiff with burning the store building in Aurora and sworn to on May 28, 1902, before Ragsdale, a notary public, this affidavit was handed to Mr. McPherson, the prosecuting attorney, when he was testifying, and he was asked to examine it and identify it, and he stated that he had seen it and that it was the affidavit of Mr. Musgrove, and as to the information he also testified that it was the original information which he filed in the Lawrence Circuit Court. No objection whatever was made to the certified copy of the order of dismissal made by the circuit court of Lawrence county. The objection is that these original files were not certified to by the circuit clerk of Lawrence county as required under section 3135, Revised Statutes 1899, which provides that "copies from the records of proceedings of any court of record of this State, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, or if there be no seal, with the private seal of the clerk, shall be received as evidence of the acts or proceedings of such court of record in any court in this State." This objection goes to the length of insisting that the original files, although identified by one who speaks of his own knowledge as to their authenticity, is not evidence. Section 3135 was enacted for the public convenience to provide for the means of proving the contents of records by certified copies thereof. It was not the purpose of this statute to exclude original instruments, which have been properly identified as such. In *State v. Chambers*, 70 Mo. 626, 627, a justice's docket was admitted in evidence upon the proof of its character by the constable who was the officer of the justice's court, and this court held that while the evidence of the justice as to the fact of the book being the docket would perhaps have been more satisfactory than that of the constable, no reason could be perceived why the fact could not be established by

the constable if he had actual knowledge of it. And so here under the evidence in this case, we can see no reason why the affidavit of Musgrove, which was drawn in the presence of the prosecuting attorney and filed by him in the circuit court of Lawrence county and his own information filed in the criminal case charging the plaintiff with arson in said court, could not be identified by him. To hold otherwise would be to hold that an original instrument fully identified is not evidence, but that a copy of it would be. We think the objection is untenable. The case of *Hickam v. Griffin*, 6 Mo. 37, is simply authority for the proposition that an affidavit not identified and of which there is no certified copy, was not admissible. Nothing said in that case is in conflict with the conclusion we have reached in this. In *State v. Rodman*, 173 Mo. 1. c. 693, the proposition was advanced that it was not competent to prove the contents of an indictment by the original itself where a change of venue had been granted to a different county from that in which the indictment had been found, because it was a file of the court from which the change of venue had been taken, and it was held that the objection was utterly untenable. In that case, the language of Mr. Justice SCHOLFIELD, in *Stevison v. Earnest*, 80 Ill. 513, was approved, wherein he said: "It is said, in books treating on evidence, that 'the record itself is produced only when the cause is in the same court, whose record it is; or, when it is the subject of proceedings in a higher court.' But this has reference to the ability of the court to compel the production of the record, and not to the question of its sufficiency as an instrument of evidence, if actually produced. The copy is receivable in evidence, not because it is better evidence than the original, but because it is presumed the original cannot be obtained. . . . It does not, logically, follow, however, that the records

being obtained can not be used as instruments of evidence, for the mere fact of obtaining them does not change that which is written in them. Whether they are where they ought to be, or elsewhere, they are records of the court. . . . What end of justice can be subserved when the records of one court are actually present in another court, by refusing to receive them in evidence and requiring them to be returned to their proper custody, there to be copied, and then receiving the copy in evidence? The facts proved must be precisely the same, whether the originals or copies are read in evidence, and it must, therefore, be totally unimportant to the party against whom the evidence is offered, which it shall be." [Day v. Moore, 79 Mass. 1. c. 524; Britton v. State ex rel., 54 Ind. 1. c. 541.]

When these documents were first offered there was no proof of their genuineness and the objection should have been sustained, but when they were afterwards fully identified by the prosecuting attorney, they were properly admitted and the error committed in the first instance was entirely cured. If the assignment is intended to apply to the original bill of exceptions, that was covered by the stipulation of the parties filed in this cause.

II. Error is next predicated on the action of the court in permitting the witness Ragsdale to testify that Tebbitts was a special agent for the Hartford Insurance Company. Ragsdale testified that the only way he knew that Tebbitts was such agent was because he came in to the witness's office and said he was. This testimony as to Tebbitts at this stage of the trial was directed to the action of Tebbitts in sending Ragsdale some printed notices of a reward offered by the National Underwriters Association for the detection and conviction of the incendiary who set fire to the building in which the Carp stock of goods was located and to

show that Tebbitts had sent the witness money from Kansas City to post the rewards, and that that money was paid to Minor, who had the rewards posted. The law is well settled in this State that an agency cannot be proved by the mere acts and declarations of one assuming to act in that capacity. [Anderson v. Volmer, 83 Mo. 403; Bank v. Leyser, 116 Mo. 68; Bank v. Morris, 125 Mo. 350; Waverly T. & I. Company v. Cooper-age Company, 112 Mo. 383.] This is conceded to be the law by the learned counsel for the plaintiff, but he insists that as it was shown that Tebbitts subsequently acted as the adjuster of one of the defendants, his acts and declarations made while acting as such, were admissible, but the acts and declarations of Tebbitts now under consideration all occurred prior to his acting as adjuster for his company, and while the company is bound by his acts in its behalf as adjuster, there was no sufficient proof that prior to the 14th of May, 1902, Tebbitts was acting as such adjuster, and consequently it must be held that this evidence was erroneously admitted.

In this connection the defendants also complain of the evidence of the posting of the reward by the National Board of Underwriters, because that body was not shown to be connected in any way with any of the defendants. We have examined the record very carefully on this point and the only ground upon which it is asserted that such a connection was shown with either of the defendants is that Tebbitts, who afterwards acted as adjuster for one of the companies, the Hartford, sent the notices of the reward and furnished the money with which Minor was paid for posting them, but we do not think that this fact of itself establishes any connection between the Hartford and the National Board of Underwriters. It is certain that neither Tebbitts nor Ragsdale claimed to be acting for the defendants or either of them. Ostensibly they represented

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the underwriters alone. It is not an uncommon thing, especially in our large cities, that an insurance agent or adjuster represents more than one insurance company and certainly his act in the performance of duties relating to one of such companies would not bind the others. As to the companies other than the Hartford there is not the slightest pretense that there was any competent evidence connecting them or either of them with the National Board of Underwriters, nor in our opinion were the defendants called upon to affirmatively establish that they had not any connection with the Board of Underwriters because the burden was on the plaintiff to show that fact in order to bind defendants by any act of the underwriters association. We think that the offer of reward by the underwriters and the payment therefor by Tebbitts was incompetent and erroneous.

It is next urged that the court erred in permitting evidence of the injury to plaintiff's business because defendants insist the record conclusively shows that he was not engaged in any business. In his petition the plaintiff alleges that he has been greatly embarrassed and defamed and caused to suffer great anxiety of mind and has lost much time and incurred and necessarily expended large sums of money in his defense in said prosecution. When on the stand he was asked, Did you lose any time in defending yourself against this prosecution? And he answered that he had from the day he was arrested until November 17th, or about six months. He was asked what his earnings were and he answered five, six and seven dollars per day, that prior to the fire he earned fifty dollars per month when he worked for H. Carp. After the prosecution was started he did hardly anything, his time was occupied trying to defend himself; that his expenses in collecting evidence in his behalf were sixty-two dollars for depositions and one hundred and fifty dollars for at-

torney fees. We think this evidence was clearly within the allegations of the pleadings. In *State to use v. McHale*, 16 Mo. App. 478, in an action on an attachment bond, it was held that the allegation that the plaintiff "was required to pay out large sums of money in defense of the suit, and suffered a loss of time in attending thereto, and was injured in his business," was sufficient to warrant a recovery for attorney fees and extra expense in the suit. That decision was approved in *State to use v. Fargo*, 151 Mo. l. c. 290. It will be observed in this case the attorney fees and time lost to which the plaintiff testified, were confined to the time he was arrested until his discharge in November and for the attorney fees incurred in the defense of the criminal prosecution alone. It cannot be said under this evidence that the plaintiff had no business whatever. It was for the jury to estimate and to take into account his loss of such business as he had.

III. Again, the admission in evidence of the petitions, answers, judgments and verdicts in the suits on the policies is urged as error because they were proceedings had after the institution of the criminal suit. On the part of the plaintiff it is insisted that they were competent to show the liability of the defendants and the efforts they were making to escape therefrom for the purpose of showing the motive the defendants had in encouraging and assisting in the criminal proceedings. When these papers were offered in evidence the objection was that they were not authenticated by a certificate of the clerk of the court from which the record came, and that the attorney could not authenticate the records by his statements. The court ruled that the attorney could not identify the papers, but that they identified themselves. The clerk of the court was not present, and Mr. McNatt, the witness who was one of the counsel in the case, was not permitted to identify the papers as the original rolls and files of the circuit

court of Lawrence county in the several cases of H. Carp against the defendants, the different insurance companies, on the policies issued by them upon the stock of goods. The court overruled the objection and admitted all the pleadings in the said cases and the defendants excepted. The objection now urged in the brief was not made at all at that time and of course is not before us for decision at this time. As we have already said, these original papers were competent as primary evidence, but in order to make them so in this case, it was essential that they should have been identified by some witness who could testify of his own knowledge that they were the original files in the said cases in the Lawrence Circuit Court, and as Mr. McNatt was of counsel in all of said cases and was one of the attorneys of the plaintiff in each of them, it was perfectly competent for him to have testified whether they were the original files or not, but the court at first excluded his testimony and refused to permit him to identify any of the papers but later on allowed him to identify the petition and answers of the defendants, which after all contained the matter which the plaintiff desired to place before the jury, to-wit, the fact that the defendants were each of them contesting their liability on the policies and containing also the stipulation of Welch and Tebbitts as adjusters for the defendants for an arbitration of the losses, which stipulation was competent as tending to show that, at that time at least, Tebbitts and Welch were the agents of and authorized to act for the defendants in regard to their liability on these policies. The court properly admitted them in evidence as against the objection then made. As to the verdict and judgment in the insurance cases, the objection simply went to their authenticity and they were covered by the stipulation between the parties which permitted any matter therein to be read

subject to relevancy and competency, and as the plaintiff read the judgment and verdict from the bill of exceptions, the objection to their authenticity was not well taken. Whether they were competent for the purpose of showing a motive on the part of the defendants for assisting in the prosecution of the plaintiff for arson is not now strictly before us, but as this judgment must be reversed, we think the petition, answers and replies in the several cases on the policies of insurance were competent to show the motive defendants had in the prosecution. We think it was perfectly competent to read the various policies themselves in evidence as tending to show the interest which the several defendants had in commencing or assisting in the continuance of the prosecution of plaintiff for arson, but the verdict and judgment were not competent. When the policies were shown and the contest over them, the jury were advised of the relation of the parties. They had nothing to do with the result of those trials, or their details.

IV. The defendants next complain of the action of the court in permitting the plaintiff to detail on the stand the testimony of Miss Blanche Williams given on the trial of the case of H. Carp against The Queen Insurance Company. When the plaintiff was asked to state what Miss Williams had testified to on the trial of that case the defendants objected for the reason that it was hearsay and not the best evidence, which objection the court overruled and the defendants excepted. The plaintiff thereupon proceeded to testify that Miss Blanche Williams, on the trial of that case, testified that she lived next door to the plaintiff's residence in Aurora, and while the fire bell was ringing the night of the fire, she saw plaintiff going through his front gate to the fire after the bell rang. This testimony was offered by the plaintiff on the theory that the defendants could, by consulting plaintiff's next

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door neighbors, have learned that he left his house after the fire bell rung, which evidence would have contradicted the statements of the witnesses who had informed the prosecuting attorney and Musgrove, who was looking up the evidence as to the plaintiff's being present at the building immediately before the fire bell rang, that he was seen standing in the shadow of the building near by after the alarm had been given. This testimony of Miss Williams was given in the civil case on the Queen Insurance policy at the November term, 1902, and the information upon which plaintiff was prosecuted for arson was filed on the 31st day of May, 1902.

In *Stubbs v. Mulholland*, 168 Mo. 1. c. 76, it was said by the court: "It has frequently been ruled in this State, that a defendant will be held responsible, not only for what facts he knew when he instituted the prosecution, but for all other facts pertinent to such prosecution, which he could by due diligence have ascertained prior to putting the machinery of criminal law in motion. [*Hill v. Palm*, 38 Mo. 13; *Sappington v. Watson*, 50 Mo. 83; *Sharpe v. Johnston*, 59 Mo. 577; *Ibid v. Ibid*, 76 Mo. 666.]" The plaintiff invokes this doctrine in support of the ruling of the court admitting this evidence as to what Miss Williams testified in November after the plaintiff had been tried in July on the charge of arson. Learned counsel for the plaintiff says that had defendants consulted plaintiff's next door neighbors, they would have learned that he left his house after the fire bell rang that night. To hold that a reasonable diligence would have required the defendants or the prosecuting attorney to have ascertained the fact that Miss Williams saw the plaintiff leave his residence after mid-night on the night of the fire and after the fire bell had sounded, when the various witnesses for the State had informed the prosecuting attorney and Musgrove, who were looking up

the evidence, that they saw plaintiff in the immediate vicinity of the burning building immediately before the alarm was given and while the fire bells were ringing, and in the absence of any evidence that she had ever disclosed this fact to any person before the information was filed or the criminal cause was tried at the July term, would in our opinion impose not a due or reasonable diligence, but would hold the defendants responsible for not having discovered evidence which might *possibly* only have been ascertained. If due diligence required the defendants to ascertain this fact before beginning the prosecution, due diligence certainly would have required the plaintiff, who was charged with the felony, to have ascertained it for his defense to that charge, and he admits that the evidence of Miss Williams was not known to him when he was tried in July for arson, and that her evidence was first used in November, three months after that trial. Upon a full consideration of the facts in this case, we are constrained to hold that this evidence as to what Miss Williams testified to for the first time in November, 1902, was not admissible in chief under the rule announced in *Stubbs v. Mulholland*, *supra*.

V. As to the objection urged that the court improperly permitted the plaintiff after examining a copy of the evidence given by Mr. White on the trial of the criminal prosecution, to state that was Mr. White's testimony at that time, it is sufficient to state that in that connection Mr. White's testimony was not read to the jury. It was perfectly competent for plaintiff to state his recollection of what Mr. White testified to on that occasion as he was present on trial at the time and heard the evidence of Mr. White. The ruling in *Traber v. Hicks*, 131 Mo. 180, is not applicable here, because, in that case, the witness was attempting to testify from written memorandum made by another one; he had no personal knowledge and had not heard

the testimony himself. Upon the objection being made, the court ruled that plaintiff could testify to anything that he knew and remembered that Mr. White swore to. It is obvious from an examination of the record that the plaintiff had only read three or four questions and answers of Mr. White in regard to Musgrove's affidavit, when the objection was made, and thereupon the plaintiff called Mr. White himself to the stand, and the further reading from the transcript of his evidence in the criminal case was dispensed with and Mr. White not only did not deny any thing that the plaintiff stated as to his evidence, but testified in full as to his connection with the cases. We think there is no reversible error on this point.

VI. Again, it is insisted that the testimony of Lafayette Harper as to Musgrove's efforts to get the witness to get information from his daughter for the prosecution of plaintiff, was incompetent, because the evidence had developed that the prosecution was not based upon the affidavit of Musgrove, and if it had been he was not the agent nor in any way connected with any of the defendants. It is true Musgrove denies that he was paid anything by the defendants or was employed by them, but a similar contention was made by the defendants in *Stubbs v. Mulholland*, 168 Mo. l. c. 80, but Judge SHERWOOD in that case, speaking of the evidence of the witness Kinney, said: "It is true Kinney stated he was not employed by Mulholland, that he volunteered his services; but Mulholland accepted those services, accepted his advice and fully acted on this advice, and having done so, Mulholland is estopped to deny that Kinney was his agent." And so we may say here, that while Musgrove disclaimed any agency for the defendants, it is nevertheless true that he reported the evidence which he gathered to Mr. White and the prosecuting attorney and they, in a large measure, acted upon that advice, and there was

much evidence tending to show that Mr. White was acting as attorney for these defendants in the prosecution of the plaintiff, and defendants are estopped from denying that Musgrove was their agent in looking up this testimony.

The evidence as to the capitalization of the several defendants was competent evidence to show their wealth, which in a case like this, is admissible.

The letter from the Underwriters' Protective Association, to Mr. T. H. Loy, written in April, 1902, some two months and a half after the fire, we think should have been excluded. There is no evidence connecting the defendants or either of them with this association; it was clearly incompetent.

The next assignment of error is based upon the admission in evidence of the testimony of Misses Blanche Williams and Susie Harper. Miss Harper was a clerk in the store of H. Carp (which was destroyed by the fire), and had been for four years previous to that time. She had assisted in making the invoice just prior to the fire; she had had fifteen years experience in clerking and had worked for Dr. Harding with the stock of goods sold by him to Carp, and which constituted a part of the stock destroyed by fire. She testified that in her judgment the stock was worth as much as ten or twelve thousand dollars. This evidence was clearly competent, and moreover she had been a witness on the criminal trial, and due diligence in endeavoring to ascertain the value of the goods burned and the amount of the invoice, would at once suggest the propriety of the defendants and the prosecuting attorney inquiring of her as to these obviously relevant matters in the investigation of plaintiff's guilt or innocence in connection with the fire.

As to the testimony of Miss Williams, we have already ruled that it was incompetent for the plaintiff in the first instance to offer that because in ascertain-

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ing the existence of probable cause upon which the defendants and the prosecuting attorney would have been justified in commencing the criminal prosecution, the defendants could not have been charged with a want of due diligence in not having ascertained it under all the facts and circumstances of the case. But it is now presented in a different aspect. It seems to be the generally accepted doctrine in this country that a defendant in a case of malicious prosecution may show the guilt of the plaintiff by any evidence in his power, even though discovered after the prosecution began or after it ended. The law does not give this action to a guilty man. As said by the Supreme Court of Mississippi, in *Threefoot v. Nuckols*, 68 Miss. l. c. 123, "Surely no reason can be assigned, nor any respectable authority produced, to justify the shocking proposition that the guilt of the plaintiff in a suit for malicious prosecution may not be shown in any manner or by any proofs, no matter where or when or how acquired. Reason and conscience revolt at the bare thought of a proven criminal recovering damages against the prosecutor." [See, also, *Bell v. Percy*, 27 N. C. 84; *Newton v. Weaver*, 13 R. I. 617; *Parkhurst v. Masteller*, 57 Iowa 478; *Whitehurst v. Ward*, 12 Ala. 264.] Acting upon this established principle of law, the defendants asked and the court instructed the jury that if they believed that the plaintiff caused the fire which destroyed or injured the property described in the criminal action against him, then their verdict must be for the defendants, no matter who commenced or was connected with the prosecution of that action, nor what their reasons were for commencing or prosecuting it. Thus the defendants tendered to the jury by their evidence and this instruction, the actual guilt of the plaintiff and not a mere question of probable cause, and the question now arises, was it competent for the plaintiff in rebuttal to disprove the evidence offered by the defendants

for that purpose, by showing that the witnesses for the defendants were either mistaken or had falsely sworn to his presence at the burning building at the times and places testified by them, by evidence that showed that he was at his home and did not start to the fire until after the fire alarms were sounded that night. In *Bigelow v. Sickles*, 80 Wis. 1. c. 101, the court, in discussing the admissibility of this character of evidence, said: "It is proper for the defendant to introduce evidence tending to show that the plaintiff was guilty of the charge, both in proof of probable cause and in mitigation of damages, and without proof that he was informed of the testimony before he made the charge. [*Bason v. Towne*, 4 Cush. 217; *Bell v. Pearcey*, 5 Ired. Law (27 N. C.) 83.] The guilt of the plaintiff being a proper issue for the defendant, there appears no good reason why the plaintiff may not rebut such evidence given or anticipated, and show that she was innocent of the charge; and if the defendant may do this without showing any previous knowledge of the testimony, why may not the plaintiff?" While it is true that in an action for malicious prosecution, the guilt or innocence of the defendant is not the issue that is tendered by the plaintiff, but the question is whether the defendants acted maliciously and without probable cause in instituting the proceedings, which resulted in his acquittal, yet when the defendants tender the issue of the actual guilt of the plaintiff which, as we have seen, is a perfect defense without regard to either malice or probable cause, can it be true that a plaintiff is powerless to rebut this issue thus tendered by the defendants by their evidence and by the court in its instructions? We agree with the Supreme Court of Wisconsin that we can see no good reason for denying the plaintiff this right; especially is this true when the evidence, as in this case of *Miss Williams*, is directed to the immediate time and place and facts covered by that of the defend-

ants. And so although this evidence was not in our opinion competent in chief for the plaintiff on the question of probable cause, because due diligence under the circumstances would not have disclosed its existence, yet when the defendants and the court tender the issue of plaintiff's guilt, we think it was perfectly competent in rebuttal to disprove the guilt of the plaintiff. In *Kennedy v. Holladay*, 25 Mo. App. 1. c. 513, it was said by the St. Louis Court of Appeals: "There was no error in permitting the plaintiff to testify that he 'did not appropriate eleven hundred dollars, or any other sum, of Holladay's money.' The criminal indictment charged that he did this. Although, as justly held in *Brennan v. Tracy*, 2 Mo. App. 540, and other Missouri cases, and as the court charged the jury in this case, the issue in such an action as this, is not whether the plaintiff was guilty of the crime charged in the criminal indictment, but whether the defendant had probable cause to believe him so, nevertheless, the fact whether he was guilty or innocent is material, as bearing upon the question of probable cause, and no ruling with which we are acquainted makes testimony as to such fact irrelevant."

VII. It is also complained that the court erred in permitting the plaintiff to read the deposition of Musgrove taken by the plaintiff in the case of *Carp v. The Hamburg Bremen Insurance Company*, for the purpose of contradicting the evidence which he gave in this case as a witness for the defendants. Plaintiff had not offered Musgrove as a witness in this case and vouched for his credibility, and it was perfectly competent to show by his deposition given on a previous trial, that he had made statements to the contrary of those he had made in this case. *Dunn v. Dunnaker*, 87 Mo. 597, is no authority for the position taken by defendants, that plaintiff was estopped from offering this deposition to contradict the witness Musgrove.

VIII. It is also relied on as error that the court permitted the plaintiff to show his good reputation for business integrity and honesty in the community in which he resided prior to the criminal charge made against him and especially because the court refused to permit defendants to show his bad reputation. That it was competent to prove the good reputation of the plaintiff prior to this criminal charge, is abundantly established by the decision of this court in *Stubbs v. Mulholland*, 168 Mo. l. c. 77, 78, 79 and 80. As to the charge that the court rejected evidence of plaintiff's bad reputation, all that appears on that subject is found in the cross-examination of Mr. McPherson, the prosecuting attorney, by counsel for the defendants. He was asked by counsel for the defendants, "Did you, when you filed the affidavit, have any information that this Sam Carp had burned out at Greenwood, Arkansas, under the name of Turk, or some similar name?" He answered: "I cannot say at the time of the institution of the suit; that information was in a letter sent here from Arkansas. I derived my information about that from a letter and perhaps a statement that Judge Underwood made to me; of course, I do not know whether it was before or after this prosecution was instituted or not, but sometime, in addition to this letter, Judge Underwood, an insurance agent, I do not know what company he represented, told me, as I understood it, that he had written some insurance policies that the companies refused and ordered cancelled because of the fire he had had sometime in Arkansas, I think under the name of Turk. I am under the impression this was all after the institution of the suit and before the trial of the criminal case. That evidence was not at the trial." This evidence on motion of the plaintiff was stricken out. It will be observed that the so-called evidence was pure hearsay and did not go to the general reputation of the plaintiff at any particular

point in Arkansas, and the prosecuting attorney's informant did not pretend to know any thing about the reputation of the plaintiff in that community; moreover, this information, whatever it was, was not given to the prosecuting attorney prior to the commencement of the criminal prosecution and hence could not have furnished any ground of probable cause for commencing the prosecution. [Hart v. McLaughlin, 51 App. Div. (N. Y.) 411.]

IX. The exclusion of the evidence of T. H. Loy as to the general reputation of the witness James Wilson, is assigned as error. On this point the record discloses the following: T. H. Loy recalled was asked, "Are you acquainted with Jim Wilson?" A. "Yes, I know Jim Wilson, commonly called 'Windy Jim,' am also acquainted with his reputation." Q. "Are you acquainted with his general reputation for truth and veracity in the community where he lives?" A. "Yes, sir, somewhat." Q. "Is it good or bad?" A. "It is not the best." Cross-examination: "I do not remember who I ever heard say it was not good; it is just what I know about him myself, I have had a lot of business with him." Q. "And you base your answer on what he does." A. "Well, partly, yes, sir." Counsel for the defendants: "We move to strike the answer out." By the court: "Let it be stricken from the jury." Counsel for the defendants: "We except." Taken as a whole, we think the court committed no error in striking out this evidence. It is quite apparent, we think, that the witness was basing his opinion of Wilson's reputation simply upon his own transactions with him.

X. As to the next assignment, to-wit, that the court erred in refusing to sustain the motion of defendants to strike out the affidavit, information and other pleadings and record, we have already passed upon the ad-

missibility of those papers and nothing further need be said in regard thereto.

XI. Having considered the various objections to the testimony, we are brought to the real controversy in this case, and that is that the court should have given a peremptory instruction on behalf of the defendants, taking the case from the jury, on the ground that this prosecution was not instigated or carried on by the defendants. This claim is largely predicated upon the testimony of Mr. McPherson, the prosecuting attorney, who filed the information and prosecuted the criminal case. He testified that he was not employed by the insurance companies to file the affidavit and was not requested by the insurance companies, or their agents, to do so, and had not received any letters requesting him to do so; he had no communication except with Musgrove, and that he filed the affidavit and information honestly believing from the evidence furnished him that the plaintiff started the fire, and he thought that the evidence was sufficient to convict the plaintiff at that time. He stated that he advised Mr. Musgrove at the time Musgrove made the affidavit against the plaintiff, that he believed that the testimony that Musgrove was giving him and what he had learned from other parties, was sufficient to convict the plaintiff. It is upon this testimony then that it is insisted there was no case to go to the jury, which tended to show that these defendants instigated or assisted in the carrying on of the prosecution against the plaintiff. No one will question upon reading this record, the absolute sincerity of the prosecuting attorney, but this insistence of the defendants entirely ignores the fact that Mr. McPherson received his impressions and formed his conclusion as to the guilt of the plaintiff from the statements made to him by Musgrove, and other witnesses whom Musgrove secured to testify. He says, "I assumed that the witnesses were telling the

truth." The evidence in the case discloses that before Mr. McPherson filed this information as prosecuting attorney, Musgrove had consulted Mr. White and besought his assistance in the prosecution of the plaintiff. The affidavit of Musgrove was drawn in Mr. White's office by Mr. White and himself, and was signed by Musgrove at the request of Mr. White. Without specifying all the details of the evidence, it plainly appears that Mr. White assisted in the prosecuting of this case from its commencement until the prosecution was dismissed by the prosecuting attorney and that he was paid for his services in this criminal case by the accredited agents and attorneys of the defendants. While it is true Musgrove denies that he was acting as the agent of these defendants in seeking evidence and urging this prosecution against the plaintiff, it is unquestionably true that the defendants accepted those services and acted upon his advice and employed Mr. White to prosecute the plaintiff on the charge of arson and, as said in *Stubbs v. Mulholland*, *supra*, the defendants are now estopped from denying that he was their agent. It requires too much credulity to believe that Musgrove was getting and devoting his time to the procurement of testimony and the prosecution of this case without expectation of reward from some interested person, and so far as the testimony in this case discloses, the only parties interested in the prosecution of the plaintiff were the defendants, who were seeking to avoid the payment of their policies on the stock of burned goods. But more than this, the evidence tends to show that within a very few days after the fire, and before Musgrove became so active in his search for incriminating testimony against the plaintiff, Mr. Milton Welch, an adjuster for all of these companies except the Hanover company, was in the city of Aurora and sent for the plaintiff and his brother, the owner of the stock of goods, and assumed the position of a

representative of these defendants as adjuster and examined the plaintiff and his brother as to the loss and amount of goods, their indebtedness, etc., and then in the presence of the witness Wilson, in the office of the local agent, expressed the opinion that Carp had burned his store, and that he would send the marshal down from Kansas City to arrest him, and that he ought to be in the penitentiary. Mr. Welch afterwards appeared in connection with these losses for all the companies except the Hanover, and signed the agreement for arbitration, and afterwards promised to pay Mr. White fifty dollars for his services in the criminal prosecution as a personal fee. While it is true that the prosecuting attorney assumed the responsibility of his prosecution, it is also certain that he did not start it until Musgrove had signed and sworn to the affidavit prepared by Mr. White in Mr. White's office in the presence of the prosecuting attorney, and did not do so until after Mr. Musgrove had given him all the information and cited him to witnesses who would testify to incriminating circumstances. We think without further elaboration that there was ample evidence tending to show that the prosecuting attorney was moved to bring this prosecution upon representations and the evidence furnished him by Musgrove, and that the defendants availed themselves of that evidence and assisted in the maintaining and carrying on this prosecution through their counsel Mr. White from the very inception of the case until its dismissal. The cases of *White v. Shradski*, 36 Mo. App. 635; *Babcock v. Merchants' Exchange*, 159 Mo. 381; *Barrett v. Chouteau*, 94 Mo. 21, are so unlike in the facts upon which the informations are predicated that they in no manner cover the law of this case. Neither do we think the cases of *Diel v. Railroad*, 37 Mo. App. 454, or the very recent case of *Milton v. Railroad*, 193 Mo. 58, are applicable, because in those cases the agents of the railway company

were not acting within the scope of their authority in procuring the arrest of the plaintiffs in those cases, nor were the companies themselves engaged in the prosecution, whereas in this case the companies avail themselves of all the acts of the self-constituted agents, if such they were, and employed counsel to prosecute and carry on the case against the plaintiff. We are clearly of the opinion that the circuit court committed no error in refusing to sustain a demurrer to the evidence on the ground that the defendants were not active participants in the prosecution of the plaintiff for arson. It may be added in this connection that the rule invoked that where the defendants truthfully disclose all the facts within their knowledge to competent counsel and are advised that there is probable cause for a prosecution, they are not liable, would not have justified the court in this case in taking the case from the jury, because, in this case, it was for the jury to determine whether Musgrove disclosed all the facts to Mr. White and the prosecuting attorney which were within his knowledge, or which were easily ascertainable by him touching the plaintiff's connection with the fire. [Stubbs v. Mulholland, 168 Mo. 47; Sharpe v. Johnston, 76 Mo. 669.]

XII. But defendants make another contention, to-wit: that the evidence connecting the plaintiff with the burning of the store was sufficient to take the case from the jury on the ground that it clearly established probable cause for the prosecution. Probable cause is a mixed question of law and fact. When the facts are undisputed, it is the duty of the court to declare their legal effect; when they are disputed, it is for the jury to determine the question under proper instructions from the court. [Hill v. Palm, 38 Mo. 13, and authorities there cited.] If the testimony offered by the defendants through Musgrove, Mrs. O. Quinn, Mrs. Horn and others stood confessed and uncontradicted there would

be much force in the contention of the defendants, but the plaintiff insists that their testimony shows facts testified to by them and by other witnesses, also, tending to show that their testimony was not reliable, and was impeached by witness for plaintiff. Under such circumstances, we think the rule is too well settled that in such a case it is a question for the jury to determine under proper instructions from the court, as the appellate courts of this State have often decided. [Sharpe v. Johnston, 59 Mo. 557, and cases cited.] Neither the circuit court nor this court would be justified in assuming the absolute truth of the testimony of Musgrove and the other witnesses for the defendants, and upon that assumption hold that this was a question of law and not of fact. [Stubbs v. Mulholland, 168 Mo. 47.] And the same can be said as to the question of malice.

XIII. This brings us to the instructions of the court. All of those asked by the plaintiff and given by the court in his behalf are challenged. The first instruction given for the plaintiff is as follows:

"The court instructs the jury, that notwithstanding you may believe from the evidence that there was sufficient evidence produced at the trial of the criminal case against plaintiff to constitute probable cause as defined to you in the other instructions, yet, if you further believe from the evidence that any material part of the evidence introduced against the plaintiff in said criminal case was false, and was known to be false, by the defendants or either of them or their agents or servants, and that said false testimony was procured or connived in by the defendants or either of them or their agents, then the jury would be warranted against such defendant or defendants, in finding that there was no probable cause for said prosecution, and that the same was malicious."

This instruction does not assume that there was false testimony given against the plaintiff, but left it

to the jury to say under the contradictions of the evidence whether it was so or not. Nor is it open to the objection that there was no evidence to connect the defendants with such testimony, and it only made the defendants liable therefor if the defendants procured or connived in the same. Nor did it hold the defendants liable for an unauthorized act of their agents. We think the instruction was well enough.

The second instruction for the plaintiff was as follows: "The court instructs the jury that the defendants' connection with the prosecution does not have to be proven by direct and positive evidence, but may be established by facts and circumstances in evidence in the case from which such connection with said prosecution may be reasonably inferred." This instruction is clearly not erroneous. And a like instruction was given at the instance of the defendants pointing out for them from their view of the prosecution what acts of the different persons connected with them would not justify a finding that the prosecution was instituted or maintained by them.

The third instruction is as follows:

"The court instructs the jury, that if you believe from the evidence in the case that the defendants herein or either of them by their servants or agents willfully, maliciously and without probable cause did aid, advise or procure an information to be filed in the circuit court of Lawrence county, Missouri, on or about the — day of May, 1902, or did willfully, maliciously and without probable cause, aid, abet and advise the continuance of said prosecution after the filing of said information by their servants or agents for the crime of arson in the third degree, and on said information a State warrant was issued, and the plaintiff was arrested upon said warrant, and thereby required and compelled to give bond for his appearance to answer said alleged offense, and that plaintiff was in accord-

ance with the conditions of said bond compelled to appear in said court, and that he did appear and was discharged, then the jury should find the issue for the plaintiff."

The objection to this instruction is that it permitted the jury to hold the defendants liable for the acts of their agents regardless of their authority from the defendants. This objection is obviously without merit. It is also insisted that this instruction was not justified because it holds the defendants liable if they aided, abetted and advised the continuance of said prosecution, whereas it is said the petition does not count upon a continuance or maintenance of the prosecution. The petition alleges "that during all the said times above referred to," that is, from the commencement of the prosecution until its end, "and each and every act done in the prosecution of the plaintiff for said crime, defendants acted with malice towards plaintiff and actively participated in the prosecution of plaintiff for said false charge from its beginning until plaintiff was fully discharged." This allegation we think sufficiently avers a malicious continuance of the prosecution and fully justified the instruction. Besides, the defendants asked and obtained an instruction which told the jury "that to entitle plaintiff to recover in this case he must prove by a preponderance of the evidence that the defendants made or caused to be made or lodged or *maintained* the complaint or affidavit upon which the plaintiff was arrested." And their objection to this instruction to the words "advise the continuance of said prosecution," is without merit when taken in connection with the whole clause, to-wit, "aided, abetted and advised." This instruction was not erroneous.

The fourth instruction is as follows:

"The jury are instructed that there are two kinds of malice, malice in fact and malice in law; the former,

in common acceptation means ill will against a person; the latter is a wrongful act done against a person intentionally. If therefore the jury believe from the evidence that the defendants or either of them by their servants or agents, were moved by ill will against the plaintiff, or that the prosecution of plaintiff was wrongfully and intentionally caused by them, or was wrongfully and intentionally maintained by them after said prosecution had begun, or either of them, then the jury should as against such defendant or defendants find that such was malicious." The same objection is made to this as was made to the last instruction, to-wit, that it permitted a recovery if the prosecution was wrongfully and intentionally maintained by the defendants after it had begun. As already said, we think the petition was broad enough, as was the evidence, to support this instruction.

The fifth instruction is in the following words:

"The court instructs the jury, that by probable cause is meant reasonable ground for suspicion, supported by circumstances sufficiently strong within themselves to warrant a cautious man in a belief that the accused was guilty of the offense charged, and if the jury believe from the evidence that the defendants or their agents were actuated with hostile and vindictive motives against the plaintiff, and that the said prosecution was without probable cause as herein defined, then they should find a verdict for the plaintiff."

The definition of probable cause in this instruction is in the exact language of an instruction given for the defendants at their request. The objection urged to the instruction that it does not state that the defendants were connected with the prosecution, is, we think, untenable, because this instruction, of course, must be read in connection with all the other instructions. Its main purpose was to define to the jury what constituted probable cause.

The sixth instruction told the jury, "That the defendants cannot shield themselves under the advice of counsel, unless the jury find and believe from the evidence that the defendants communicated to such counsel all the facts bearing upon the guilt or innocence of the accused in the criminal case, which they knew or by reasonable diligence could have ascertained, and you are therefore instructed that if you believe from the evidence that the defendants or their agents intentionally concealed or falsely represented or neglected to ascertain and advise said counsel of all the facts which they knew or by the exercise of reasonable diligence could have ascertained bearing on the innocence or guilt of the accused in said criminal case, then the advice of counsel is of no avail as a defense in this case." This instruction is in harmony with the law declared in *Stubbs v. Mulholland*, 168 Mo. 47.

The seventh instruction is in this language: "If the jury find for the plaintiff he will be entitled to recover such actual damages as the jury may believe from the evidence he suffered by reason of the prosecution; and in considering his actual damages, you may take into consideration the reasonable value of the time necessarily employed by him in preparing his defense and the reasonable value of attorneys' fees, if any, contracted by him in his defense, and the mental anxiety, if any, suffered by him in consequence of such prosecution, as well as the injury to his reputation and business, as you may believe from the evidence resulted from said prosecution, not exceeding, however, the sum of ten thousand dollars, the amount claimed on that account in the petition; and you may add to such an amount so found as exemplary damages considering the defendants' financial ability to pay, as you believe from the circumstances and the facts detailed in evidence would serve as a proper punishment to the defendants or either of them, not exceeding however as

such punitive damages the sum of fifteen thousand dollars, the amount claimed in plaintiff's petition."

It is first objected that this instruction improperly submitted to the jury the question of punitive damages, when there was nothing upon which to base the same. With this we cannot agree, because, if the plaintiff's evidence was true and believed by the jury, there was evidence tending to show actual malice. We have already held that the petition and the evidence authorized damages for the injury of plaintiff's business. [State to use v. McHale, 16 Mo. App. 478; State to use v. Fargo, 151 Mo. 290.]

Again, the refusal of the second instruction asked by the defendants is assigned as error. That instruction is in these words: "The court instructs you to entitle plaintiff to recover in this case, he must prove by a preponderance of the evidence that the defendants made, or caused to be made or lodged, or maintained, the complaint or affidavit upon which the plaintiff was arrested, and that they did so maliciously and without probable cause, and if you find and believe from the evidence that the complaint was made and maintained by the prosecuting attorney of Lawrence county, upon his own motion, and without any request or procurement on the part of the defendants, then your verdict should be for the defendants."

This identical instruction was prayed and refused in *White v. Shradski*, 36 Mo. App. 635, and the Court of Appeals held that in the light of the issues in that case and the testimony adduced at the trial, the refusal of the instruction was harmful and constituted reversible error. It is well settled in this State that courts should only instruct upon the state of case which the evidence justifies. We think that the evidence in this case does not authorize this instruction. We have already expressed our views as to this being a prosecution by the prosecuting attorney upon his own motion

and at his own instance. We think that his own evidence and that of Mr. White and Musgrove and the requirement of an affidavit by Musgrove before the prosecuting attorney would begin this prosecution, all demonstrates beyond a question that this was not a case brought by the prosecuting attorney of his own motion, but he was induced to bring it by the representations of Musgrove as to what the evidence would be, and upon talking with the witnesses to whom Musgrove referred him, he very wisely took the precaution of having Musgrove make an affidavit as to the guilt of the plaintiff herein, and filed that affidavit with his information.

The facts of this case are wholly unlike those of *White v. Shradski*, which we think was correctly ruled. Moreover, this is a civil case and the circuit court is not bound of its own motion to correct instructions asked, but if the instruction is erroneous, the court is not bound to give it. This instruction is otherwise faulty in that it permitted a finding for the defendants if they did not begin the prosecution. Whereas the court in their instructions properly instructed the jury that if they maintained a continuance of the prosecution and aided and abetted it until its end with malice and without probable cause, they were liable. We think the court committed no error in refusing this instruction upon the uncontradicted facts in evidence.

The court also refused the following instruction: "The court instructs you that the question for you to decide is not whether the plaintiff was guilty of the crime of arson, for which he was prosecuted, but whether the defendants, or those who started said prosecution, had reasonable grounds to believe him guilty of such crime, and in this connection you are instructed that if the evidence of such crime, on the trial of the criminal charge, was such as to cause the jury trying the plaintiff to disagree and to fail to re-

turn a verdict acquitting the plaintiff of such charge, then you will be authorized in finding that such prosecution was with probable cause, and your verdict in such case should be for the defendants.”

While the court refused this instruction in these words, it practically gave the same in another instruction for the defendants, changing it, however, so as to read “that a failure to return a verdict acquitting the plaintiff was a circumstance from which they could infer such prosecution was with probable cause.” As authority for this instruction, we are cited by the learned counsel for the defendants to *Johnson v. Miller*, 63 Iowa l. c. 538, 539 and 540, in which the Supreme Court of Iowa held that evidence that the jury disagreed on the first trial was admissible to show probable cause although on a subsequent trial the plaintiff was acquitted, the court holding that it was prima-facie evidence of probable cause. Upon the examination of the authorities upon which that decision is based, we find ourselves unable to concur in that view of the law. In our opinion the disagreement of the jury established no fact and is a wholly immaterial matter on the trial of a cause for malicious prosecution. To admit evidence of this character and to instruct the jury that the disagreement of a jury in the trial of a criminal cause would be evidence of probable cause, would be to open up an entirely collateral issue and lead the jury away from an investigation of the issue tendered by the pleadings. We have been unable to find any other case from any court of last resort in this country, which justifies this instruction. The court committed no error in refusing this instruction, but did err in giving the one to the same practical effect, which it did give. But of this, of course, defendants are in no position to complain, as it was self-invited error. The evidence upon which this instruction was based should have been ex-

cluded when offered by the defendants and the plaintiff.

The court also refused an instruction asked by the defendants that the affidavit made and signed by Musgrove and filed in the office of the clerk of the circuit court of Lawrence county with the information in the criminal case, did not constitute the commencement of a criminal proceeding, but such proceeding was commenced solely and alone by the affidavit of the prosecuting attorney, which was filed in the office of the clerk of the circuit court. This instruction was properly refused for two reasons, first, the affidavit of the prosecuting attorney was not the commencement of the criminal proceeding, but the information filed by him was the legal basis thereof, and second, the instruction was properly refused because, although the information was the institution of the prosecution, the gravamen of this prosecution is that it was induced by the affidavit and statements of the defendants through Musgrove and the advice of Mr. White and maintained by the defendants throughout until that prosecution ceased. The instruction was out of place and would have served no good purpose in enlightening the jury as to their duty in the consideration of the issues they were called upon to try.

XIV. It is also insisted that the damages allowed by the jury are excessive. The verdict is a large one, but in a case of this character the amount of damages is largely a question for the jury. The law concedes a wide latitude of discretion to the jury in actions of this class, and their verdict should not be interfered with unless the appellate court can say it was the result of prejudice, passion or malice. Numerous considerations must necessarily enter into the question of what is just compensation in such a case, but no definite rule can be laid down to any of them. The law has provided that the jury shall decide this question. Dis-

grace is a relative term; what is such to one man is not necessarily so to another, and while it applies to each, its effect or measure is great or small as other conditions exist. Mental anxiety and pain caused thereby and humiliation and danger from a prosecution for a grave criminal offense, are all conditions for the jury, as well as the jeopardy in which the liberty of the plaintiff was placed by such prosecution. We are unable to say, after a careful consideration of all this evidence, that the verdict of the jury was such as to evince passion, prejudice or malice towards the defendants by the jury.

XV. While as we have already said in respect to the elements that go to make up the damages in a case of malicious prosecution, mental anguish, pain and injury to the feelings may be considered by the jury, we are of the opinion that the testimony of Mr. Jonas as to the evidence of mental worry, which he noticed in the plaintiff, that he went around hanging his head and acting as if he was in deep trouble and not in his right mind, was not the proper way to prove the damages from mental anguish, and the disgrace suffered by the plaintiff. Evidence of this character would open the door for all kinds of self-serving testimony. We think this evidence should have been excluded.

XVI. In the reply brief by the counsel for the defendants, the objection is renewed to the pleadings and proceedings in the civil cases of H. Carp against these appellants on the ground that these actions were subsequent to the criminal prosecution and, therefore, could not have entered into the question of probable cause or malice. And our attention is specifically called to the case of Vansickle v. Brown, 68 Mo. 632. It has often been ruled in actions of this character that where the evidence shows that the purpose of encouraging or maintaining criminal prosecutions is the en-

forcement of a civil liability, it is evidence of want of probable cause. [Eagleton v. Kabrich, 66 Mo. App. l. c. 237; Clark v. Thompson, 160 Mo. 461; Stubbs v. Mulholland, 168 Mo. 47; Schofield v. Ferrers, 47 Pa. St. 194.] The same principle must apply where the purpose is to avoid civil liability.

It is also insisted that the court erred in permitting counsel for plaintiff in his argument to state matters not in evidence; to-wit, that Musgrove had kept the witnesses for defendant at Mt. Vernon during the criminal trial, and to refer to one of the witnesses for plaintiff as a prominent member of the World's Fair Commission and to refer to counsel for defendants as the "oily-tongued gentleman from Chicago."

As all of these matters can readily be avoided on another trial, it is not necessary to determine whether either or all of them constitute reversible error. It is to be hoped that on the next trial counsel will refrain from all matters not fairly within the record and if they do not that the circuit court will see that they do.

For the errors noted in the admission of evidence the judgment of the circuit court must be and is reversed, in order that the jury may reach a verdict uninfluenced by such incompetent and extraneous matter. While we have ruled that the counsel could identify certain files of the court, we desire to add that all such questions should be avoided by calling the clerk of the court, the lawful custodian of such files and records, and let him identify the records and files of his court.

The judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed.

Fox, P. J., and Burgess, J., concur.

CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE

APRIL TERM, 1907.

MORRELL, Appellant, v. LAWRENCE.

Division One, April 11, 1907.

1. **IMPLIED CONTRACT: Physician: Services Rendered Defendant's Adult Son.** A promise to pay for the services is not implied from the fact that a father calls a physician to attend his sick son who is a man of mature age; but when the circumstances are such as to lead the physician to believe, and to charge the father with knowledge that the physician believes, that the father is undertaking to pay for the services to be rendered, the father is liable. And in some cases it is for the jury to draw the inference of an implied contract from the facts.
2. **———: ———: ———: Question for Jury: This Case.** The relation of physician and patient had existed between plaintiff and defendant's son for several years, the physician residing in St. Louis, and the son and defendant mostly in New York. For the services prior to 1900 the son paid the physician's bills. In 1900 the son went to Europe and the plaintiff went as his attending physician, he testified upon the request of defendant and his promise to pay for the services, but on his return, defendant refused to pay, a misunderstanding arising between him and plaintiff, and the son settled the matter. In 1902, the son being then forty-two years old, a man of considerable means carrying on a business of his own, living not with his

father but at a hotel in the same city with him, the father telegraphed to plaintiff: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday via Big Four. Answer at once." Plaintiff gave up his business in St. Louis, and on the next day started for New York, and on arrival there was met by defendant's messenger, taken to defendant's house, and by him to see the son, and treated the son for forty days, until his death. *Held*, that, under the circumstances, the question of whether or not there was an implied contract on defendant's part to pay, that is, whether or not the defendant intended plaintiff to understand and the plaintiff did understand that defendant would pay for the services which the telegram called him to render, was properly submitted to the jury.

3. ———: ———: Value of Services: Wealth of Defendant. The court should not instruct the jury, on the issue of the measure of damages, to take into consideration the fact that defendant is a wealthy man. The physician, if entitled to recover at all for services rendered a patient, is entitled to recover the reasonable value of the services rendered, no more and no less, whether defendant be rich or poor. In such case, the jury have no concern with the question of defendant's ability to satisfy the judgment.
4. ———: ———: ———: ———: When Admissible. If the defendant should introduce evidence to show that plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plaintiff should have the right to show in rebuttal, if such were the fact, that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. To that extent, and under those conditions, the wealth of defendant may be shown.
5. ———: ———: ———: ———: Erroneous Instruction; Cured by Another. In one instruction the jury were told that "in determining what is the reasonable value of the services rendered by the plaintiff" as a physician, they should take into consideration the ability of the defendant to pay. *Held*, that this error was not cured by another instruction which told the jury that "the evidence touching the financial ability of defendant may be considered by the jury not to enhance the fees above a reasonable compensation, but solely to determine whether defendant is able to pay a fair and just and reasonable compensation for the services rendered."
6. ———: ———: Evidence: General Reputation. Where plaintiff sues for professional services rendered by him as a physician to defendant's son in New York, and alleges these ser-

Morrell v. Lawrence.

vices to be worth so much, and makes no claim for a loss from his usual income by reason of his absence from home in the service of defendant, testimony that he was a physician of good reputation in the community of his home, is not competent. It is competent to show that he is a physician of learning and skill, and that fact should be taken as an element in estimating the value of the services rendered, but his general reputation as a physician has no more to do with his case than his general reputation as a man.

7. ———: ———: **Instruction: Assuming Verdict for Plaintiff.** An instruction should not apparently assume that the jury is going to find for plaintiff and assess the value of the services in question, and be limited to directions to the jury as to what they are to take into consideration in making the assessment. The jury should be given to understand that before they reach the question of the amount of their award, they should determine the main issue of whether or not they will find for plaintiff, such as, "If the jury find for plaintiff, then in determining what is the reasonable value of the services rendered, they will take into consideration," etc.
8. ———: ———: **Services Rendered Defendant's Son: Evidence: Financial Ability of Son.** Where plaintiff sues defendant for professional services rendered his son, and knew in a general way the financial standing of both father and son, it is error to exclude evidence offered by defendant to show that the son was a man of considerable fortune and amply able to pay for the services rendered. Such evidence bears on the issue of the existence of defendant's implied promise to pay, that is, it would naturally militate against plaintiff's inference that defendant intended to pay for the services.
9. ———: ———: ———: **Excessive Verdict.** It is peculiarly within the province of the trial judge to set aside a verdict as being excessive.

Appeal from St. Louis City Circuit Court.—*Hon. O'Neill Ryan*, Judge.

AFFIRMED.

Boyle & Priest and *Edward T. Miller* for appellant.

(1) Instructions 2 and 3 properly declare the law and the court erred in setting aside the verdict on the

ground that they are erroneous. *Hurt v. Jones*, 105 Mo. App. 111; *Ryan v. Hospes*, 167 Mo. 361; *Ward v. Kohn*, 58 Fed. 462; *Railroad v. Campbell*, 81 Fed. 1003; *Morissette v. Wood*, 123 Ala. 384; *Lange v. Kearney*, 4 N. Y. Supp. 14, 127 N. Y. 676; *Lombard v. Bayard*, 1 Wall. Jr. 196; *Succession of Haley*, 50 La. Ann. 840; *Breaux v. Francke*, 30 La. Ann. 336. (2) The verdict is fully supported by the evidence and the court erred in setting it aside as excessive. *Wells v. Sanger*, 21 Mo. 354; *Longan v. Weltmer*, 180 Mo. 335; *Heimelrich v. Carlos*, 24 Mo. App. 264; 1 *Graham & Waterman on New Trials* (2 Ed.), 451; 14 *Enc. Pldg. and Prac.*, 755.

Dawson & Garvin and Rassieur, Schnurmacher & Rassieur for respondent.

(1) When a person requests a physician to perform services for another, the law does not raise an implied promise to pay the reasonable value of the services so rendered, unless the relation of the person making the request, to the patient, is such as imposes a legal obligation on him to call in a physician and pay for his services. And where such relationship does not exist there can be no liability to the physician, in the absence of an express promise to pay. *Holmes v. McKim*, 109 Iowa 245; *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232; *Jesserich v. Walruff*, 51 Mo. App. 270; *Curry v. Shelby*, 90 Ala. 277; *Raoul v. Newman*, 59 Ga. 408; *Smith v. Watson*, 14 Vt. 332; *Starrett v. Miley*, 79 Ill. App. 658; *Beach on Modern Law of Contracts*, sec. 652; *Wood on Master and Servant*, secs. 69, 70. (2) And a promise by the parent of an adult or emancipated child will not be implied from the fact that the parent requests a physician to attend such child, even though such child be sick at the parent's house. *Rankin v. Beale*, 68 Mo. App. 325; *Boyd v. Sappington*, 4 Watts (Pa.) 247; *Crane v. Baudouine*,

55 N. Y. 256; Edelman v. McDonnell, 126 Cal. 210; Smith v. Watson, 14 Vt. 332; Madden v. Blaine, 66 Ga. 49; Dorion v. Jacobson, 113 Ill. App. 563. (3) Evidence of the financial condition or ability of defendant to pay, as a basis for determining the reasonable value of plaintiff's services, was improper. The court erred in admitting such evidence, and emphasized its error by instructing the jury that if they found for plaintiff they might, among other elements, consider "the ability of the person liable therefor to pay." Robinson v. Campbell, 47 Iowa 625; Morrissett v. Wood, 123 Ala. 384; Lange v. Kearney, 4 N. Y. Supp. 14, 127 N. Y. 676. (4) Defendant was entitled to show his son's ability to pay for the services rendered him by plaintiff, and that, in point of fact, the expenses of his illness, so far as they were paid in his lifetime, including the hotel and traveling expenses of plaintiff, were paid by the son, or for him by the cashier of his business, and not by defendant. Boyd v. Sappington, 4 Watts (Pa.) 247. (5) The evidence as to plaintiff's standing and reputation in his profession was irrelevant, and should have been excluded. Prietto v. Lewis, 11 Mo. App. 601; Jeffries v. Harris, 10 N. C. 105; Nash v. Gilkenson's Executor, 5 Serg. & R. 352. (6) The verdict was grossly excessive. Therefore, the trial court was warranted in declining to order a *remittitur*, and in setting it aside altogether. Chitty v. Railroad, 148 Mo. 64; Norris v. White, 158 Mo. 20; McCloskey v. Pulitzer Pub. Co., 163 Mo. 22; Friedman v. Pulitzer Pub. Co., 102 Mo. App. 683.

Boyle & Priest and *Edward T. Miller* for appellant in reply.

(1) The character of the telegram from defendant to plaintiff is such that the lower court would have been authorized in declaring as a matter of law that a promise to pay for plaintiff's services was implied.

In any event, the telegram and the subsequent conduct of plaintiff and defendant furnish complete justification of the court's action in submitting the case to the jury. *Smith v. Myers*, 19 Mo. 433; *Cowell v. Roberts*, 79 Mo. 218; *Ryan v. Hospes*, 167 Mo. 342; *Lilliard v. Wilson*, 178 Mo. 145; *Voerster v. Kunkel*, 86 Mo. App. 197; *Hentig v. Kernkle*, 25 Kan. 559; *Railroad v. Winterbotham*, 52 Kan. 433; *Gerlach v. Turner*, 89 Cal. 446; *Bradley v. Dodge*, 45 How. Prac. 57; *Wood, Master and Servant*, secs. 67, 76; *Beach, Modern Law of Contracts*, sec. 650. (2) Respondent contends that the evidence as to plaintiff's professional standing should have been excluded. That the evidence was properly admitted an examination of the following authorities will clearly demonstrate: *Millener v. Drigg*, 10 N. Y. St. Rep. 237; *Lange v. Kearney*, 51 Hun 640, 4 N. Y. Supp. 14, affirmed 127 N. Y. 676; *Heintz v. Cooper*, 47 Pac. (Cal.) 360.

VALLIANT, P. J.—Plaintiff sues on an alleged implied contract of defendant to pay him the reasonable value of his services as a physician rendered to defendant's adult son at defendant's request.

The facts are: The defendant and his son, Frank Lawrence, both former residents of St. Louis, were at the time in question living in New York City, the son, forty-two years of age, was not living with his father but at a hotel; he was a man of considerable means carrying on a business of his own. Plaintiff is a physician residing in St. Louis. While defendant and his son resided in this city the latter became in bad health and came under the care of the plaintiff; the relation of physician and patient had existed between them for several years. Plaintiff's bills for medical services rendered in St. Louis to Frank Lawrence were presented to and paid by him. In 1899 plaintiff in St. Louis received a telegram from defendant then in Vir-

ginia asking him to go to some place in Michigan where his son then was sick, to minister to him as a physician, and plaintiff was on the eve of going when he received another telegram stating that Frank had already started for his home in St. Louis; on his arrival here plaintiff rendered him medical services and he paid the bill. In 1900 Frank Lawrence went to Europe and the plaintiff went with him as his attending physician. The plaintiff testified that he did not go on that journey at the request of Frank Lawrence alone, but on the request also of Dr. Lawrence, the defendant, who promised plaintiff that he would pay him or see him well remunerated for his services, that after their return from Europe he spoke to Dr. Lawrence about paying him and Dr. Lawrence repudiated the contract; all the pay plaintiff received for his services on that trip lasting three months was \$1,000, which Frank paid. So much for the business relations between the parties prior to the transaction now in suit.

On May 31, 1902, Dr. Lawrence and his son then living in New York and the plaintiff in St. Louis, the plaintiff received a telegram from defendant in the following words: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday *via* Big Four. Answer at once." Plaintiff answered June 1: "Will leave on Big Four at noon to-day." He accordingly arrived in New York on the afternoon of June 2, was met at the station by a messenger of Dr. Lawrence, conducted to the latter's residence, and after tea was conducted to the hotel where Frank Lawrence lay very ill. Plaintiff remained in constant attendance on the sick man, ministering to him day and night until he died July 9. The particular character of the services rendered was in evidence and there was testimony on the part of the plaintiff tending to show that the services were worth \$300, \$400, \$500,

and \$1,000 a day. The amount of the bill sued for was \$16,000, itemized at \$400 a day for forty days. The evidence on the part of the defendant was that from \$4,000 to \$6,000 would be ample pay for the services rendered. The verdict was for the plaintiff for \$12,666. The court sustained defendant's motion for a new trial on the ground of error in the instructions, and that the verdict was excessive; the plaintiff appealed.

I. Before we reach the points on which the trial court based its ruling we must consider the point first presented in the brief for defendant, that is, that the plaintiff made out no case to go to the jury. The defendant's proposition is that from the facts and circumstances shown by the plaintiff's evidence the law implies no promise or obligation on the part of the defendant to pay for the services rendered. There is no express contract on the part of the defendant shown; if he is liable it is on an implied contract. According to the defendant's estimate of the evidence there is shown a request by defendant of plaintiff to render services for the benefit of another and nothing more. In their brief the learned counsel quote the law as laid down in *Wood on Master and Servant* (2 Ed.), section 70: "The rule is that, in order to render one liable for services rendered at his request, they must be rendered for his benefit, or under such circumstances that the person requested to render them was justified in understanding that they were for his benefit or upon his credit. But if the person performing the services knows they are not for the benefit of the person making the request, and that he is under no legal obligation to pay therefor, he cannot predicate a claim against him, unless he expressly promised to pay for them before the services were rendered."

That is a correct statement of the general rule of law on that subject, but it is not of invariable application. We see no objection to applying it to the case

of one calling a physician to a suffering stranger when there is nothing in the situation to suggest to the physician that the man calling him has any deeper interest in the case than the prompting of common humanity. And we see no objection to applying the rule to the case of a father calling a physician to wait on his son if the son is of age and living to himself and if there is nothing in the conditions to indicate that the father is taking upon himself anything more than the office of messenger for his son. But there is something more than the dictates of common humanity between father and son and the fact of that relationship is to be considered in connection with other circumstances, if there are other circumstances, indicating to the physician that the father calls him on his own account to serve his son.

In an early Pennsylvania case cited in the brief for defendant, *Boyd v. Sappington*, 4 Watts 247, it was held that no contract to pay for the services was implied from the mere fact that the defendant called a physician to attend his adult son lying ill at defendant's home. The evidence showed that the father had called on the physician and made the request, the physician at first hesitated, the father insisted and the physician complied. The physician knew that the son, although living with his father, was over twenty-one years old, in business for himself and had property to answer the demand. The father, when he was requesting the physician to go, stated to him that it was his son's request that he should come. It was held that out of those facts an implied contract on the part of the father to pay the bill did not arise. The court said: "There is nothing in the special circumstances relied on to take it out of the general principle; and it is very clear, that had the defendant been a stranger, however urgent he may have been, and whatever opinions the physician may have formed of his liability, he would

not have been chargeable without an express agreement to pay; as, for instance, in the case of an innkeeper, or any other individual whose guest may receive the aid of medical advice. A different principle would be very pernicious; as but few would be willing to run the risk of calling in the aid of a physician, where the patient was a stranger, or of doubtful ability to pay." That is the strongest case cited in the brief for defendant in support of his theory on this branch of the case. Except for the fact that in that case the sick man was the defendant's son there was nothing to distinguish it from the case of calling a physician to the aid of a stranger under his roof. The physician called was within the field of his daily work, there was nothing unusual in the call.

In *Crane v. Baudouine*, 55 N. Y. 256, the patient was the defendant's daughter, a married woman living with her husband separate from her father's family, and when taken sick had come to her father's home to be under the care of her mother. The father had not requested the physician's attention to his daughter, but received him when he came, conversed with him about the case and knew the extent of the services rendered. The court held that the father was not liable for the physician's bill.

Edelman v. McDonell, 126 Cal. 210, is also referred to. In that case the physicians had undertaken the treatment of the defendant's son at his request, and after they had begun to render their services the father made statements to them that induced them to believe that he intended to pay the bill and they stated that they relied on those statements and gave credit to both father and son and the suit was against both. It did not appear in the evidence what services were rendered after the alleged statements of the father or their value. The court held that the contract was that of the son,

that the alleged statements of the father were not in writing and he was not bound.

In Rankin v. Beale, 68 Mo. App. 325, there was testimony tending to show that a father had requested the physician to attend his son, twenty-three years old, then sick in the father's house, and that after the services had been rendered the father promised to pay for the same; there was testimony on the other side contradicting this. The court instructed the jury to the effect that although the son was over twenty-one years of age, yet if he was sick in his father's house and the father requested the physician to attend him or if the father stated to the physician that he would pay the bill then he was liable. That instruction directed a verdict against the father either on an implied agreement or express contract, the implied agreement resting alone on the father's request to the physician to attend his son, the express undertaking on a promise to pay after the services had been rendered. The court held that the mere request did not imply an agreement to pay and that the promise made after the services had been rendered was *nudum pactum*.

From those decisions the learned counsel citing them draw the conclusion that a promise to pay the bill is not implied from the fact that a father calls a physician to attend his sick son who is a man of mature age, and to that extent we think the conclusion is justified, but we do not go with the counsel to the extent of holding that a father calling a physician to attend his adult son can be rendered liable only on an express contract, because we hold that the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered. Whilst the calling of a physician to the bedside of a sick man has in the nature of the case its own elements of ex-

ception to the general rule, yet it is not put so far in a class to itself as to exempt it entirely from the category of implied contracts. Whether the facts of a case are such as to present a question of whether or not a contract may be implied is sometimes a question of fact and sometimes one of law; if in the facts relied on, taken as true, there is nothing to justify the inference the court will so decide as a matter of law, but if they are such as that if credited the inference might or might not legitimately be drawn it is a question of fact. We think the evidence for the plaintiff in this case tends to prove a condition of affairs from which the triers of the fact, if they should see fit to draw the inference, might with reason do so that Dr. Lawrence intended the plaintiff to understand and the plaintiff did understand that he would pay for the services which the telegram called the plaintiff to render. This was not a call on the plaintiff for services in the field of his daily work. It called him away from his established field of action, it called him in effect to resign his practice, to dedicate himself for the time being solely to the service of the defendant's son, whatever the consequence might be to his general practice. This is altogether outside of the category of the cases above referred to. The patient was not one of twenty or more for whom the physician might prescribe in a day, he was one for whom the physician must give up all other patients. The call was a very unusual one and it involved unusual financial consequences.

The plaintiff had made a trip to Europe in professional attendance on defendant's son and, according to his testimony, he had undertaken that journey partly at least on the request of defendant, but when they returned defendant denied that he had made the request and refused to recognize the obligation. The testimony on that point was meagre, but it indicates that on the return from the trip to Europe there was a mis-

understanding between plaintiff and defendant as to the liability of the latter for the services rendered on that occasion, the defendant denying that the trip had been taken at his request and the plaintiff did not press the point. The matter ended with plaintiff's receiving from Frank Lawrence a sum of money which he regarded as inadequate. After that came the transaction now under consideration in which there is no room to question at least one fact, that is, that the plaintiff went to New York and entered upon this service at the request of the defendant. The telegram was not couched in form of a message from the sick man, the writer was not in the character of the conveyor of a request from another and did not assume to express merely another's wish or merely make the announcement that there was a sick man there needing attention. He expressed his own desire, uniting his own with that of his son or possibly of some other member of the family, under the first person plural of the pronoun: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday *via* Big Four. Answer at once."

If the plaintiff's testimony gives the correct version of the controversy or misunderstanding as to the defendant's liability for the services rendered on the trip to Europe, Dr. Lawrence should have known that the plaintiff would understand that telegram as carrying by implication a promise to pay or at least that he was liable to put that construction on it.

The telegram is to be interpreted in the light of the relation of the parties and of their past transactions with each other. Whether in that light the defendant had reason to believe that the plaintiff would understand the telegram to imply an agreement to pay and plaintiff did so understand were questions for the jury under proper instructions, and if the jury should so find the verdict should be for the plaintiff.

II. It was shown in evidence over the objection of the defendant that he was a very wealthy man, and on the measure of damages the court in its instructions authorized the jury to take that fact into account. The instructions covering that point were as follows:

"2. In determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account the circumstances and conditions under which the services were rendered, the length of time employed, the professional character and standing of plaintiff, the absence of plaintiff from his residence and place of business, the nature of the ailment of the patient, the nature of the services themselves, the danger, if any, of infection or contagion incident thereto, the professional skill and experience required for their proper rendition, the ability of the person liable therefor, to pay, together with all other facts and circumstances shown in evidence, relative to such services; and, having considered all such facts and circumstances, the jury should fix the value of the services at such an amount as under all the evidence they believe to be reasonable and proper."

"3. The jury are instructed that the evidence touching the financial ability of the defendant may be considered by the jury not to enhance the fees above a reasonable compensation, but solely to determine whether the defendant, if they find, under the other instructions, he is liable at all, is able to pay a fair and just and reasonable compensation for the services rendered to his son."

The trial court sustained the defendant's motion for a new trial on the ground partly that those instructions were erroneous. In that ruling the court was correct.

We are referred to some decisions as sustaining the proposition that the fact that a man is amply able to respond to a judgment for the debt sued for is one

to be taken into account in determining the amount to be awarded against him, but to the extent that those cases so hold we do not agree with them. Among those cited are two Missouri cases, *Hurt v. Jones*, 105 Mo. App. 106, and *Ryans v. Hospes*, 167 Mo. 342, but we do not understand those cases as so holding. *Hurt v. Jones* is only authority for saying that evidence showing a custom of trade fixing the value of the services of a real estate agent negotiating a sale at two and a half per cent of the value of the property sold was admissible; the ability of the defendant to pay was not brought into question.

In *Ryans v. Hospes*, the plaintiff sued for the reasonable value of his services as a nurse rendered to defendant's testator in his lifetime, in his last illness. The defendant himself introduced the evidence of the value of the estate, and made the fact of the testator's great wealth the basis of an argument that a presumption of payment must be indulged. There was no instruction to the jury to take into account the wealth of the testator, in assessing the reasonable value of the services. The amount awarded in the verdict was within the value testified to by the plaintiff's witnesses, and there was no evidence for defendant tending to show that that estimate was excessive. In commenting on the amount of the verdict the court used the language quoted in the brief of plaintiff's counsel that "while the verdict would be large for such services rendered a person of ordinary means, it must be borne in mind that Dr. Bradford was a man of great wealth; that he had no family to bear a portion of the burden of nursing him in his afflicted old age," etc. That language was not used in deciding any question at issue in the case, and it seems rather to relate to the nature of the services, that is, the exclusiveness on the plaintiff of the burden of nursing. But however that may be, the question we are now to decide was not in that case.

In a case of this kind, if the plaintiff is entitled to recover at all, he is entitled to recover the reasonable value of the services rendered. He is entitled to a verdict for the reasonable value of his services, although the defendant may be a poor man; he is not entitled to a verdict for more than the reasonable value of his services, although the defendant may be a man of great wealth. The jury, in a case of this kind, have no concern with the question of the defendant's ability to satisfy the judgment.

Ward v. Kohn, 58 Fed. 462, is cited in the brief for plaintiff. There the court commented on the well-known practice in our profession of charging a poor man less for legal services rendered than those services are worth and on the other hand of charging a wealthy client a full, fair and reasonable compensation, and the court said: "The fees the attorney deserves from such a client should not be measured by the inadequate compensation and small fees the gentlemen of the bar usually received from those who are unable to pay at all or to pay a fair compensation, but they should be measured by the fees usually obtained by attorneys for like service from those who are able to pay just compensation for the services rendered." That is to say, in estimating the value of the services the jury should not take for a standard of measurement the fees a lawyer would charge a poor man, in consideration of his poverty, but should estimate the services at their full, fair value. That is sound doctrine as far as it goes, but it does not authorize the plaintiff to show to the jury the defendant's wealth as an element, to be taken into the account in the measurement of the value of the services, unless it is in rebuttal of evidence from the other side attempting to show the custom of a lower standard. If the defendant should introduce evidence to show that the plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plain-

tiff would have a right to show if such was the fact that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. In the case at bar there was no effort on the part of defendant to prove that the plaintiff or other physicians were in the habit of charging smaller fees for like services, hence there was no occasion for rebuttal evidence to show that smaller fees were charged out of consideration for the poverty of the patients and that defendant's financial condition did not entitle him to that indulgence.

Instruction 3 did not cure the error in this respect of instruction 2; it justified the jury in believing that there was a difference between the reasonable value of services rendered a rich man and those of the same kind rendered a poor man. There is no such difference.

III. Over defendant's objection testimony went in to show that the plaintiff was a physician of good reputation in the community, and instruction numbered 2 authorized the jury, in assessing the value of the services, to take that fact into account. That was error. The plaintiff's general professional reputation was not drawn in question, and the jury had no right to consider it in estimating the value of the services.

The plaintiff's professional reputation in the community would doubtless have some influence on the amount of income derived from his practice, and if that was in dispute and if he was suing for loss of income caused by absence from home in the service of defendant, evidence of that reputation would be admissible. But there was no question of that kind in the case. The plaintiff testified that his income was \$6,000 to \$10,000 a year, and there was no dispute of that. Besides, he is not suing for compensation for loss of income occasioned by absence from home in the service of defendant. His petition is short and to the point;

in it he says that at the request of the defendant he rendered professional services to defendant's son and that the services rendered were reasonably worth \$16,000. It is the value of the services alone that he sues to recover.

It was competent for the plaintiff to show that he was a physician of learning and skill, and that fact should be taken as an element in estimating the value of the services rendered. But the plaintiff's general reputation as a physician had no more to do with the case than his general reputation as a man.

IV. Instruction 2 is faulty also in this: It apparently assumes that the jury is going to find for the plaintiff and assess the value of the services in question and the instruction is limited alone to directions as to what the jury should take into account in making the assessment. The instruction should have given the jury to understand that before they would reach the question of *quantum valebat* they should find for the plaintiff on the main issue, something for example, like this: If the jury find for the plaintiff, then, in determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account, etc. We do not regard this as a grave error, but since it has been called to our attention we pass judgment on it that it may be corrected at the retrial.

V. The court excluded evidence offered by defendant to show that the defendant's son Frank Lawrence was a man of considerable fortune and amply able to pay for the services. It was error to exclude that testimony. The testimony showed that the plaintiff, the defendant and the defendant's son were well acquainted with each other. Plaintiff knew in a general way the financial standing of the father and the son. If it had been the fact that the son was impecunious and the plaintiff knew it and defend-

ant knew that the plaintiff knew it, would not that fact have naturally influenced the plaintiff in drawing the inference that the defendant intended to pay for the services he called him to perform? And on the other hand if it was known to both parties that the son was himself a man of considerable wealth would that not naturally render the inference less violent? It was a fact by no means conclusive but it was one of the many facts in the case to be taken into account and given such weight as the jury should see fit to give it.

VI. The learned trial court also assigned as a reason for granting the new trial that the verdict was excessive. That is a point peculiarly within the province of the trial judge, it is one that he is better qualified to judge than an appellate court, the law puts that important responsibility upon him and it advances the cause of justice when the trial judge courageously performs that duty. [Friedman v. Publishing Co., 102 Mo. App. 683.] We see nothing calling for a review of the ruling of the trial court on this point.

The order granting a new trial is affirmed.

All concur except *Woodson, J.*, not sitting.

VIOLA A. JOHNSON v. ST. JOSEPH TERMINAL RAILWAY COMPANY and ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Appellants.

Division One, April 11, 1907.

1. **FEDERAL JURISDICTION: Negligence: Two Corporations: Fraudulent Joinder.** The Federal court has no jurisdiction, on the theory of diverse citizenship, over a suit, by a citizen of this State for personal injuries received in this State, against two railroad companies, one a Missouri and the other a Kansas corporation, even though the foreign company allege, in its motion to transfer, that the cause of action as to it is a sep-

arable one from the one alleged against the domestic company (on whose track the injured party was working at the time he received the injuries inflicted by the foreign company's train) and that it was fraudulently joined as a defendant in an attempt to deprive it of its right to transfer the cause to the Federal court.

2. ———: Assuming Jurisdiction After Appeal. Where the Federal court wrongfully assumed jurisdiction after judgment in the State court and after appeal, the appellate court will dispose of the appeal as if no transcript had been filed in the Federal court.
3. **NEGLIGENCE: Contributory: Wantonness.** Where the injured party was in a place where he had a right to be and in a place where the defendant corporation had the right to expect him to be, and that place is one of imminent peril, the "humanitarian doctrine" applies, and it is not necessary either to allege or prove wantonness, recklessness or wilfulness; and even if contributory negligence is shown, plaintiff will not be denied the right to recover simply because no wantonness is shown.
4. ———: ———: Ordinance Speed: Signal: Question for Jury. Where the ordinance fixes a maximum speed for trains of five miles per hour and requires the bell of each locomotive engine to be rung continuously within the city limits, ordinary care does not require a trackman at work on the track to continuously look for an approaching train whose arrival is expected, but he has the right to work on and assume that those in charge of the train will obey the ordinances; and if there is evidence that they disregarded the ordinances in both respects, and evidence to the contrary, the court will not declare as a matter of law he was guilty of contributory negligence, but that question is one for the jury.
5. **MARRIAGE: Invalidity: Burden: Presumptions.** A second marriage, when shown to have been entered into according to the forms of law and to have been followed by the maintenance of marital relations, is clothed with every presumption of validity; and if its validity is drawn in question, the burden is on the attacking party, and that burden he must assume even to the proving of a negative. The presumption is not overcome by a showing that the deceased husband was previously married in due legal form to another woman, that she is still alive, that no divorce was ever granted to her knowledge, and that none was granted to him in the places where he was known to have had an established residence. The law indulges the presumption of innocence and rather than find the party guilty of bigamy will indulge the presumption of divorce. (*Distinguishing Snuffer v. Karr*, 197 Mo. 182, where it was admitted that there had been no dissolution of the first marriage.)

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6. ———: ———: **Strained Construction.** Where the wife of the first marriage for nearly ten years lived with another man by whom she had two children, and for \$100 settled with defendants for the killing of the man for whose negligent death plaintiff as his second wife sues, and claimed no more, and upon the receipt of the money agreed to and did testify, and on hearing of the death of that man married the man with whom she had been living, the facts do not invite a strained construction against the validity of the second marriage.
7. **NEGLIGENCE: Contributory: Humanitarian Doctrine: Instruction.** If the "humanitarian doctrine" applies to the case, as shown by the facts, contributory negligence is eliminated, and there is no necessity for incorporating into plaintiff's instruction designed to cover the whole case the question of whether or not the injured party was guilty of contributory negligence.
8. ———: ———: **Embraced in Defendant's Instruction.** Where plaintiff's given instruction designed to cover the whole case omits any direction to consider the question of contributory negligence, but specifically directs the jury to consider defendants' instructions as to the duties of the injured party, and in those instructions the doctrine of contributory negligence is fully set forth, it cannot be held that the case was unfairly committed to the jury, even if the question of contributory negligence is properly in the case.
9. ———: **Two Defendants: Joint Control of Train: New Point.** Where the point was not raised in the original brief, or in the trial court, that the evidence does not support the allegation that the train which inflicted the injuries on deceased was under the control of both defendants, the point was not timely raised.
10. ———: ———: ———: **Traffic Arrangements.** Where the traffic arrangement introduced in evidence amounts to a leasing of the tracks of the Missouri corporation to the foreign corporation whose train inflicted the injury, they are jointly liable. And if the servants in charge of the train were required to await the signals of the servant of the Missouri company before the train could proceed over its tracks, that is evidence that the train was under the joint control of both companies.

Appeal from Buchanan Circuit Court.—*Hon. A. M. Woodson*, Judge.

AFFIRMED.

Gardiner Lathrop, Thomas R. Morrow, Samuel W. Moore, James P. Gilmore and R. A. Brown for appellants.

(1) A sufficient petition and bond for removal having been filed in due time by the Atchison, Topeka & Santa Fe Railway Company, it was the duty of the court below to proceed no further than to make an order of removal, and all subsequent proceedings were *coram non judice*. *Powers v. Railroad*, 169 U. S. 92; *Remington v. Railroad*, 198 U. S. 95; *Railroad v. Daughtry*, 138 U. S. 298; *Railroad v. Dunn*, 122 U. S. 513; *Carson v. Hyatt*, 118 U. S. 279; *Stone v. South Carolina*, 117 U. S. 430; *Berry v. Railroad*, 64 Mo. 553; *Stanley v. Railroad*, 65 Mo. 508. (2) It being shown to the court that a transcript of the record in the State court has been properly filed in the United States Circuit Court, and that that court had assumed jurisdiction, the trial court should now be reversed, and all proceedings herein held *coram non judice*. *City of Ashland v. Whitcomb*, 129 Wis. 549; *Railroad v. McMullin*, 86 Wis. 597; *State v. Frost*, 113 Wis. 623; *Robertson v. Kottrell*, 69 N. H. 430; *Stuart v. Bank*, 57 Neb. 569; cases under point 1. (3) The deceased having been guilty of contributory negligence, and there being neither allegations nor proof of wantonness, willfulness or recklessness in the handling of the train in question, there can be no recovery in this case. *Evans v. Railroad*, 178 Mo. 598; *Sharp v. Railroad*, 161 Mo. 214; *Tanner v. Railroad*, 161 Mo. 497; *Davies v. Railroad*, 159 Mo. 1. (4) Plaintiff having utterly failed to prove herself the lawful wife of the deceased, she is not entitled to recover in this case. *Williams v. Williams*, 63 Wis. 58; *Railroad v. Thorndike*, 24 R. I. 105; *Goodwin v. Goodwin*, 113 Iowa 319; *Barnes v. Barnes*, 90 Iowa 232; *Ellis v. Ellis*, 58 Iowa 720; *Gilman v. Sheets*, 78 Iowa 499; *Wilson v. Allen*, 108 Ga. 275; *Cartwright v. McGowen*, 121 Ill. 388. (5) Even if the

case were one which should have been submitted to a jury (which we deny), plaintiff's first instruction given by the court is manifestly erroneous, and the verdict and judgment cannot stand. *Evans v. Railroad*, 178 Mo. 508; *Davies v. Railroad*, 159 Mo. 1; *Nelson v. Railroad*, 68 Mo. 593; *Isabel v. Railroad*, 60 Mo. 475; *Maher v. Railroad*, 64 Mo. 267; *Rine v. Railroad*, 88 Mo. 392; *Zimmerman v. Railroad*, 71 Mo. 476; *Kelly v. Railroad*, 11 Mo. App. 1; *Keefe v. Railroad*, 92 Iowa 182; *Kellny v. Railroad*, 101 Mo. 67; *Scoville v. Railroad*, 81 Mo. 434; *Harlan v. Railroad*, 64 Mo. 22; *Morgan v. Railroad*, 159 Mo. 262. (6) Plaintiff's instruction 4 was erroneous, and the verdict and judgment cannot, therefore, stand. 5 Am. and Eng. Ency. Law (2 Ed.), 30, 39 and 40; *Ham v. Barrett*, 28 Mo. 388; *Moberly v. Railroad*, 98 Mo. 183; *Rapp v. Railroad*, 106 Mo. 423; *Meyers v. Kansas City*, 108 Mo. 480; *Erhart v. Dietrich*, 118 Mo. 418; *Bluedorn v. Railroad*, 121 Mo. 258; *Weller v. Railroad*, 120 Mo. 635; *Schepers v. Railroad*, 126 Mo. 665; *Payne v. Railroad*, 129 Mo. 405; *Morton v. Heidorn*, 135 Mo. 608; *Lee v. Knapp & Co.*, 55 Mo. App. 390; *Sackberger v. Grand Lodge*, 73 Mo. App. 38; *Haycraft v. Grigsby*, 98 Mo. App. 354; *Winter v. Supreme Lodge*, 96 Mo. App. 1; *Oliver v. Love*, 104 Mo. App. 73; *Schmisser v. Beatrice*, 147 Ill. 210; *Murray v. Murray*, 6 Ore. 18.

Mytton, Parkinson & Crow for respondent.

(1) The court did not err in denying the Santa Fe Company's petition to remove to the Federal Court, for the reason that the Terminal Company was liable to plaintiff for the death of her husband if the Santa Fe Company had been guilty of negligence which caused his death. Especially is this true where lessor retains possession and control of the road as here. *R. S.* 1899, sec. 1060; *Markey v. Railroad*, 185 Mo. 359;

Smith v. Railroad, 61 Mo. 17; Railroad v. Crane, 113 U. S. 424; Heron v. Railroad, etc., 68 Minn. 542. Even the Santa Fe Company does not deny its liability if it was guilty of negligence, but in its petition for removal expressly asserts its liability if it was guilty of negligence, and plaintiff having a cause of action against the Terminal Company as well as the Santa Fe Company, had the lawful right to hold defendants jointly liable or sue either. R. S. 1899, sec. 545; Railroad v. Sloan, 125 Ill. 72; Railroad v. Doan, 195 Ill. 168; Logan v. Railroad, 116 N. C. 940. Where the statute of the State in which the cause of action is pending expressly authorizes the joining of a non-resident and a resident, and makes both persons liable for the injury, the cause is not removable. Lanning v. Railroad, 94 S. W. 491; Railroad v. Thompson, 26 Mo. 161; Railroad v. Bohan, 26 Sup. Ct. Rep. 166. (2) This case involves the principle of law repeatedly and uniformly announced by this court commonly known as the Humanitarian or Last Chance Doctrine, namely, "Where one unconscious of a peril has negligently placed himself in a position of danger so far away from that danger that his death may be averted by the use of ordinary care by those who see him and who control the dangerous instrumentality, his death is actionable." We desire to call the court's attention to recent expressions applicable to the facts in this case: Hinzman v. Railroad, 182 Mo. 611; Eppstein v. Railroad, 94 S. W. 967; Baxter v. Railroad, 95 S. W. 856. (3) The deceased was entitled to the presumption under the facts in this case that he had obtained a divorce from his first wife, her actions in living with a man as his wife and having two children born while occupying that relation, holding herself out to the world as the wife of Powell and the deceased contracting a marriage with plaintiff openly and in the most public manner possible and in a com-

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munity where all the facts were known. Certain' the jury was authorized to do as it did, refuse to believe the testimony of Cora. Her life and conduct were such as to cause the jury to look upon her testimony with suspicion and especially was this true after admitting that she had received one hundred dollars from defendant. It is of course the common belief that a woman who will come into court and bastardize her offspring is unworthy of belief on any question, especially so, after she by her conduct has asserted their legitimacy for more than seven years. *Klein v. Laudman*, 29 Mo. 259; *Johnson v. Johnson*, 114 Ill. 611; *Bolden v. McIntyre*, 119 Ind. 574; *Coalrun Coal Co. v. Jones*, 127 Ill. 379; 19 Am. and Eng. Ency. Law (2 Ed.), 1208. (4) Plaintiff's instruction 4 declared the law on the question of the validity of the marriage. *Bolden v. McIntyre*, 119 Ind. 574. There is no instruction on behalf of plaintiff on contributory negligence, because the issue is not in the case and was not before the court for adjudication either under the pleadings or the evidence. *Johnson v. Railroad*, 173 Mo. 307; *Squires v. Kansas City*, 100 Mo. App. 628; *Morton v. Kramer*, 180 Mo. 536; *Chambers v. Chester*, 172 Mo. 461; *Perrette v. Kansas City*, 162 Mo. 238; *Grace v. Railroad*, 156 Mo. 295.

GRAVES, J.—Plaintiff is the alleged widow of John C. B. Johnson, deceased. Petition was filed within the time allowed by statute, but as originally filed asked for but \$2,000 damages. Later it was amended so as to make the *ad damnum* clause read \$5,000 instead of \$2,000. The action is therefore the statutory action under section 2864, Revised Statutes 1899, to recover the penal sum of \$5,000, due the wife for the negligent killing of her husband.

Defendant St. Joseph Terminal Railroad Company is a Missouri corporation, and defendant Atchi-

son, Topeka & Santa Fe Railway Company is a Kansas corporation. Johnson was a section man in the employ of the Terminal Company. He was run over and killed by a Santa Fe train within the limits of the Terminal Company's switch yards in the city of St. Joseph. Defendant Santa Fe Company filed its application and bond for the removal of the cause to the U. S. Circuit Court, at St. Joseph, Mo. This application was, by the trial court, overruled. It might be well to state here that plaintiff had on February 19, 1903, brought a previous suit, which had been transferred to the Federal court, but this suit was dismissed by plaintiff in the Federal court at the September term, 1903, and the present suit brought December 14, 1903. The failure of the State court to transfer the present suit to the Federal court is urged as error. The application for removal was in due form and alleged that the cause of action, so far as the Santa Fe Company was concerned, was a separable cause of action from the one alleged against the Terminal Company, and that the Terminal Company was fraudulently joined in an attempt to deprive the Santa Fe Company of its right to transfer said cause to the Federal court.

The allegations of the petition in so far as are necessary for the opinion, are as follows:

"Plaintiff states that on or about the 18th day of December, 1902, a train of cars attached to a locomotive engine, the property of the Atchison, Topeka & Santa Fe Railway Company, passed along over the railroad tracks belonging to the Atchison, Topeka & Santa Fe Railway Company to the southern limits of St. Joseph and passed from said railroad tracks belonging to said Atchison, Topeka & Santa Fe Railway Company to the tracks of the defendant, St. Joseph Terminal Railroad Company.

"Plaintiff further states that by a traffic arrangement between said defendant companies, immediately

upon said locomotive engine and train of cars entering upon the tracks and roadway of the said Terminal Railroad Company, the servants, agents and employees in charge of said train became subject to the orders and directions of both the St. Joseph Terminal Railroad Company and the Atchison, Topeka & Santa Fe Railway Company, that said agents, servants and employees, were in the employ of the said Atchison, Topeka & Santa Fe Railway Company, but were also compelled to obey the orders and directions of the St. Joseph Terminal Railroad Company while said locomotive engine and train of cars were upon its tracks.

"Plaintiff states that after passing from the tracks of the Atchison, Topeka & Santa Fe Railway Company and onto the tracks of the St. Joseph Terminal Railroad Company the said defendants both had full, complete and absolute control of said locomotive engine and train of cars and from the time of entering the said yards of the Terminal Railroad Company said locomotive engine and train of cars was under the joint direction and control of defendants.

"Plaintiff states that under the direction and orders of the defendants Atchison, Topeka & Santa Fe Railway Company and the St. Joseph Terminal Railroad Company, said locomotive engine and train of cars passed from the southern limits of said city of St. Joseph, over and upon the tracks of the defendant, St. Joseph Terminal Railroad Company up to and north of Hickory street in said city of St. Joseph, Missouri, without sounding any whistle during all of said time or ringing any bell and at a rate of speed in excess of twenty miles per hour; and that during all of said time said locomotive engine and train of cars was within the corporate limits of the city of St. Joseph and under the joint control and direction of the defendants herein as above alleged.

"Plaintiff states that from the southern limits of

the city of St. Joseph to north of Hickory street said locomotive engine and train of cars passed over and across Hickory street and many other streets between said Hickory street and the southern limits of said city of St. Joseph, Missouri.

“Plaintiff states that it was the duty of the agents, servants and employees of defendants herein and of the companies who had control and direction of said servants to ring a bell continuously from the time said locomotive engine and train of cars entered the corporate limits of the city of St. Joseph, and to blow a whistle at the crossing of each street in said corporate limits and to not run said locomotive engine and train of cars at a rate of speed exceeding five miles per hour; that the above duty is enjoined upon defendants by section 1, of chapter 81 of the General Ordinances of the City of St. Joseph, Missouri, 1897, and section 6 of chapter 61 of said Ordinances; that it was the duty of defendants to cause their employees who were under their control and direction to obey the provisions of said ordinances above referred to. Plaintiff further states that said defendant companies failed and refused to obey the provisions of said ordinances as above set forth.

“Plaintiff further states that on the morning of the 18th day of December, 1902, a heavy snow storm producing what is commonly called a blizzard was prevailing in St. Joseph, Missouri, and about 10 o'clock on the morning of said day it became the duty of John C. B. Johnson to sweep and clean out the snow and remove the dirt from the frogs, switch junctions and roadbed of defendant St. Joseph Terminal Railroad Company in the city of St. Joseph in its yards at a point one hundred feet north of Hickory street in said city.

“Plaintiff says that prior to and at said 18th day

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of December, 1902, plaintiff and John C. B. Johnson were husband and wife.

“Plaintiff states that for a distance of several hundred feet south of the point at which her said husband was at work at said time and place, the road bed and railroad tracks of the defendant companies were in a straight line and there was nothing to obstruct the view of the engineer or fireman and other employees and servants of defendants who were in charge of said locomotive engine and train of cars from seeing the position of plaintiff’s said husband as he labored and worked at the place heretofore mentioned and that the agents, servants and employees of defendants who were in control and had direction of the movements of said train saw plaintiff at work upon the railroad tracks over and upon which the train was passing, or in the exercise of ordinary care, said agents, servants and employees ought to have seen him and the danger to which he was exposed by the rapid and silent approach of said locomotive engine and train of cars in time to prevent his being run over or in time for him to prevent same if he had been warned of said danger.

“Plaintiff further states that while her said husband was working on the tracks, over which said locomotive engine and train of cars were passing, as his duty required him to do, said locomotive engine and train of cars came up to him without ringing the bell or sounding the whistle and at a rate of speed not less than twenty miles per hour, ran against and over and upon plaintiff’s said husband, thereby causing his instant death and on account of the condition of the weather and the failure of defendants to perform their duty as required by the ordinance hereinabove referred to, plaintiff’s said husband was killed and through no fault of his own.

“Plaintiff states that the death of her said husband was caused solely by reason of the careless and

negligent manner in which said locomotive engine and train of cars were operated under the joint control and direction of the defendants herein and that by reason thereof she has been damaged in the sum of \$5,000."

Answer of the Santa Fe Company was a general denial, coupled with plea of contributory negligence and assumption of risk. That of the Terminal Company a general denial, coupled with a plea of contributory negligence. Reply, general denial. Verdict, signed by ten jurors, was for the plaintiff for \$5,000, upon which judgment was entered. Motion for new trial and in arrest of judgment were filed and overruled, as was also motion for judgment for defendants notwithstanding the verdict of the jury. Thereupon an appeal was duly perfected to this court by both defendants.

Deceased was killed December 18, 1902, about ten o'clock in the morning. It was rather a cold morning and deceased was bundled up with overcoat and cap, the cap being pulled down over his ears. Considerable snow had fallen just previous to the injury, and defendant was engaged in clearing away the snow and ice from a switch in the Terminal yards. A rough plat of the situation was introduced in evidence and we make it a part of this statement, as a better idea can be gathered therefrom than from a mere bare statement.

is a cross-over track owned by the Santa Fe, which is likewise used. At point C the Santa Fe trains enter upon the Terminal Company's tracks and continue thereon until point A is reached. At A and from there to F is a Santa Fe cross-over, and the trains move over this cross-over to F, and from F over the Lexington branch of the Santa Fe into Union Station. The deceased was struck at point B, by a passenger train of three cars and an engine, the length of which train was 190 to 200 feet. This train was a passenger train and came from Topeka, Kansas, in over the Rock Island tracks, south of point E, and from point E proceeded to point C, crossing the Hannibal & St. Joe tracks at point D, and from C it proceeded north to B, the point of the accident, and on north until it was brought to a stop by reason of the accident. It was due at Union Station at 10:10 and was only three or four minutes late that morning. Union Station was something less than a mile beyond the point of accident. From E to C is 108 to 110 feet; from C to B is 520 feet; from B to A is 320 feet; from A to F is 96 feet; from C to the south line of Hickory street is 370 feet; Hickory street is 50 feet wide; from north line of Hickory street to B is 120 feet. There seems to be some few immaterial discrepancies in the foregoing distances, but they are taken from the evidence, and are nearly enough correct to answer the purposes of this statement.

North of Hickory street were two switches which were opened by a pilot, or person in the employ of the Terminal Company, whose duty it was to open and close these switches, and then board the train and accompany it to the depot, at which point the train was turned over to the pilot.

If it was proper for the train to proceed over these two switches, the pilot so signaled to the engineer of the train, and he answered the signal by two short blasts of the whistle. There was nothing to obstruct

the view of the engineer or fireman from some considerable distance below E to point B, the point of the accident.

In evidence are two sections of a city ordinance, as follows:

“Section 1. *Rate of speed*—No locomotive engine, railroad passenger car or freight car shall be driven, propelled or run upon or along any railroad track within said city at a greater speed than the rate of five miles per hour.”

“Section 6. *Bell to be rung*—The bell of each locomotive engine shall be rung continually while running within said city.”

For the plaintiff there is direct evidence that no bell was rung nor whistle sounded before the deceased was struck; that the train was running twelve to fifteen miles per hour; that the usual practice among the section men, where the train was running five miles per hour, was to leave the track when the train got within 75 or 100 feet of them; that a train of the kind which struck deceased could have been stopped within thirty feet, if running five miles per hour and within ninety feet if running fifteen miles per hour; that there was a traffic arrangement by which the Santa Fe Company used the tracks of the Terminal Company; that deceased was bending over at work at the time he was struck, or at least just a few minutes prior thereto; that when the foreman of the section men was with them he kept a lookout for trains and engines and notified the men; that it was the custom for section men to look out for themselves; that there were six or seven section men who worked at different places all over the yards. That plaintiff was the widow of deceased. The latter fact was testified to by plaintiff, who says she was married to Johnson August 7, 1900, by John T. Warburton at his office in the court house in St. Joseph, and the certificate of marriage intro-

duced in evidence shows the same facts and further that Warburton was a justice of the peace. Mrs. Johnson also testified that after she was married she learned from her husband that he had been previously married. She also testified that in the same conversation in which he told her that he had been married, he also told her that he had been divorced. This conversation between the parties was brought out by defendants upon cross-examination, and after they had brought out a part thereof, the court permitted plaintiff to bring out the remainder, which was the part as to a divorce. Such was the plaintiff's case.

For the defendant, the evidence shows that the whistle was sounded at the Hannibal & St. Joe crossing, point D, and was again sounded just before the train reached Hickory street, in response from the signal of the pilot; that the bell was continuously being rung up to the time deceased was struck; that the train was running from five to six miles per hour; that it was the custom of the trackmen or section men to look out for themselves and protect themselves from approaching trains and engines; that it was customary and usual for them to continue their work until such time as the train got within fifteen or thirty feet of them, and then to step out of the way and let it pass; that there was nothing to prevent the engineer from seeing deceased; that the engineer did not see Johnson, but the fireman saw him working at the switch on the west side of the track just prior to the accident, but his attention was attracted to the pilot and he, the fireman, did not see deceased just at the time of the accident; that the train within favorable conditions could have been stopped within one hundred to one hundred and twenty feet; that owing to the amount and the character of the work the section men had to be scattered, one or two in a place, in different parts of the yard; that owing to his numerous duties, the foreman could not

be with all of the different men; that Johnson had worked in the yards at this time for six weeks, but was an old experienced section man; that the foreman always cautioned the men to look out for trains and switch engines; that Johnson was so cautioned the morning of the accident by the foreman when he put him to work; that Johnson had a cap drawn down over his ears. The defendant also introduced a marriage license, and a certificate of marriage, showing that the deceased had been married to Elizabeth Prather in Clay county, Missouri, July 22, 1890. This first wife was living and testified in the case under the name of Mrs. Cora Elizabeth Powell; she testified that she lived with Johnson as his wife between three and four years; that she married Powell about a year after Johnson's death, but had kept house for him and his boy for nearly ten years; that she lived in Platte county; that she had never been divorced from Johnson as far as she knew. It appeared that she had two children, one eight and the other four years of age, but she would neither admit nor deny that they were Powell's children. It also appears from the evidence that deceased Johnson was in and out of St. Joseph, and defendants account for his whereabouts for the time between 1893 or 1894, the time his first wife left him, to the date of his death, with the exception of about three years. They show that he was not divorced in Buchanan county, although he had sued his wife, Cora E., for a divorce in 1892, in that county, but dismissed the suit in November, 1892. The evidence shows that he afterwards lived with Cora E., as his wife, until the final separation a year or two later. Johnson lived in Doniphan county, Kansas, for awhile and it was shown that no divorce was granted him there.

The foregoing sufficiently states the facts. Question was raised as to the instructions and the admis-

sion of evidence, which will be noticed in the course of the opinion.

I. The defendant Santa Fe Railway Company first urges that there was error in the refusal of the trial court to transfer this cause to the Federal Circuit Court. The application and bond were timely tendered. Trial of the cause was begun February 16, 1904, and verdict returned February 24, 1904; on February 25, 1904, the day after the verdict was returned, defendant filed in the Federal court a transcript from the circuit court of Buchanan county in this cause. On March 5th an appeal was granted by the trial court to this court. On March 9th, four days after the jurisdiction was in this court, the Federal Circuit court refused to remand the cause and assumed jurisdiction thereof, and gave defendant leave to file an answer later, which answer was filed in said court July 7, 1904.

We gather these facts as to the action of the U. S. Circuit Court, from a certified transcript of its proceedings filed with the clerk of this court, and mention them, more on account of the novelty thereof, than on account of the effectiveness of such transcript. If there was error on the part of the trial court in refusing to transfer the cause, we will so determine, uninfluenced by what may have been done in the Federal court after trial and verdict, and after the jurisdiction was in this court. The doctrine of court comity seems to have been lost sight of in this cause. If we should err in our judgment as to whether the State or Federal court had jurisdiction of the cause, the Federal question is fully lodged in the case and our error can be corrected by the United States Supreme Court instead of having it determined in advance by a Federal trial court.

In our judgment there was no error in refusing to transfer this cause. The jurisdiction is in the State

court and not in the Federal court. This much mooted question of jurisdiction has been cleared up and made plain by the Supreme Court of the United States in very recent cases, all of which are gone over and reviewed by this court In Banc in the case of Lanning v. Railroad, 196 Mo. 647, which case and the doctrine therein announced was again approved by this court In Banc, in Stotler v. Railroad, 200 Mo. 107. The exact question in this case is fully discussed in those cases, and being satisfied with the conclusion reached in them we will not add length to this opinion by a further discussion of the question. Under the authority of the Lanning and Stotler cases, *supra*, and the opinions of the United States Supreme Court, therein cited and discussed, we rule this point against the defendants.

II. What we have said hereinabove disposes of the second contention of the defendants, to the effect:

"It being shown to the court that a transcript of the record in the State court has been properly filed in the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, and that that court had assumed jurisdiction, the trial court should now be reversed, and all proceedings herein held *coram non judice*."

We hold that the trial court was right in retaining jurisdiction and the United States Circuit Court was wrong in assuming jurisdiction, so that we reach the third ground of error assigned, in words as follows:

"The deceased having been guilty of contributory negligence, and there being neither allegations nor proof of wantonness, wilfulness or recklessness in the handling of the train in question, there can be no recovery in this case."

(a) In this case where the party was in a place where he had a right to be, and in a place where defendants had a right to expect him to be, for the purpose of disposing of the latter portion of this point we can

concede the question of contributory negligence, where there is imminent peril, and the "humanitarian doctrine," now recognized by this court, applies, for it is not necessary to allege and prove wantonness, wilfulness or recklessness. This exact point has been covered in an opinion by LAMM, J., in a recent case. [White v. Railroad, 202 Mo. 539.]

(b) Was there contributory negligence shown in this case? To determine this question all the facts must be considered. It is true that deceased knew that trains and engines were likely to pass over the point where he was working at any time. But, whilst this is true, it is likewise true that, by ordinance, the bell was required to be continuously rung, and the speed of the train reduced to five miles per hour. The violation of this ordinance was negligence *per se* upon the part of the railroad company. There is no evidence that there were other moving engines close at the time, although there was a switch engine some distance north waiting for this train to pass on this particular track, so that it could use it. So as far as the evidence shows there was not the sound of a bell in or around the deceased to attract his attention. Suppose he did know of the time the train was due, yet under the evidence for the plaintiff he had a right to believe that the signal whistles would be so sounded south of Hickory street, and that a bell on the approaching engine would be continuously rung to advise him of any imminent danger. If these customary signal whistles were not sounded just south of Hickory street and the bell upon the engine was not rung, can it be said there was such contributory negligence as would authorize a peremptory instruction? Would an ordinarily careful and prudent person, expecting a train to arrive, and knowing it to be the duty of the operators of the train to run it at not exceeding five miles an hour and continuously ring the bell, be looking down the track to see if it was approaching, or

would he work on and await what he knew they would do, if they did their duty, i. e., sound the signal whistles shortly south of him, 320 feet south of him according to the evidence of the fireman, and continuously ring the bell from the city limits to the depot? Under the facts in this case we think the question of contributory negligence was one for the jury. A different question might be presented if there had been no legally fixed duty as to speed of train and ringing of the bell.

III. It is further contended that defendant, the Atchison, Topeka and Santa Fe Railway Company, was, at the time of the accident, conducting its train in the usual and ordinary manner, and if there was negligence in its manner of operating the train, deceased knew of its manner of operating such train, and thereby assumed the risk. A sufficient answer to this proposition is that such is not the evidence. It is true that the evidence for defendants showed that the whistle was sounded, the bell rung and practically the rate of speed prescribed by the ordinance maintained, and that the train was run on that day as it was ordinarily run, but plaintiff's evidence shows that it was not so run on this occasion. Citation and discussion of the many cases relied upon by defendant are unnecessary under the evidence. The cases cited have no application to the facts of this case. The evidence of the plaintiff shows an unusual and negligent (gauged by the ordinance in evidence) running of the train.

IV. Points five and seven made by the defendants will be considered together for the reason that they both attack instruction number 4 given at the instance of the plaintiff. This is the interesting question presented in this record. Instruction four reads:

"No. 4. The court instructs the jury that if you believe from the evidence that plaintiff and John C. B.

Johnson were married on the 7th day of August, 1900, you are instructed that notwithstanding the fact that John C. B. Johnson had contracted a prior marriage said last marriage was legal and valid unless you find from the evidence that the woman with whom John C. B. Johnson was formerly married is alive and that no divorce was secured in this or any other State by John C. B. Johnson or the woman whom John C. B. Johnson married prior to the time of contracting the marriage with plaintiff and the burden is upon defendants to overcome the fact of marriage, if you believe there was a marriage between plaintiff and John C. B. Johnson, by proving to your satisfaction that the woman with whom John C. B. Johnson intermarried prior to his marriage with plaintiff is still alive, or that there was no divorce granted either John C. B. Johnson or the woman with whom he had contracted marriage prior to the marriage with plaintiff."

By this instruction, when applied to the facts of this case, the defendants are required to assume the burden of proving by negative proof that there had been no dissolution by divorce, of said prior marriage. Defendants in fact assumed that burden and did prove that, in two places of residence established by deceased, no divorce had been procured and further by showing that the first wife had procured no divorce. The question, however, for us to determine, is whether or not this instruction properly places the burden of proof, and if it does, it was a question for the jury to determine whether or not the burden had been successfully carried. The cases upon this point are by no means harmonious. We start with every presumption in favor of the validity of the marriage of plaintiff and deceased. Singular to say, a case from our own court, *Klein v. Laudman*, 29 Mo. 259, is the basis of practically all the law cited by plaintiff in support of this instruction, and in fact the basis of several potent de-

cisions not cited by plaintiff. So that it devolves upon us to say whether that case properly declared the law, and whether or not, other courts, citing and approving it, have properly analyzed and applied the doctrine announced therein.

In the Klein case, *supra*, Klein and his wife had sued Laudman and wife for slander. Defendants denied the speaking of the words and in effect denied that Klein and Margaret Klein, the plaintiffs, were husband and wife. Mrs. Klein had stated that she had been previously married in Germany and these admissions were proven. Based upon that proof, the trial court gave this instruction for defendants:

"If the jury find from the evidence that the plaintiff Margaret Klein was married in Germany to another person than Leonard Klein, the plaintiff, then such relation is presumed to continue; and it devolves upon the plaintiffs to prove to the satisfaction of the jury that such marriage was legally terminated before the date of the marriage certificate, read in evidence, or they cannot recover."

In discussing this instruction, NAPTON, J., who delivered the opinion, said:

"We think the first instruction which the court gave, in this case, at the instance of the defendants, was erroneous. There was no presumption that a marriage, which was proved to have existed at one time in Germany, continued to exist here after positive proof of a second marriage *de facto* here. The presumption of law is, that the conduct of parties is in conformity to law, until the contrary is shown. That a fact, continuous in its nature, will be presumed to continue after its existence is once shown, is a presumption, which ought not to be allowed to overthrow another presumption, of equal if not greater force, in favor of innocence. The fact of a marriage in Germany, which was established in this case by the declar-

ation of one of the plaintiffs, was entirely consistent with the validity of the marriage *de facto*, which, beyond all dispute, existed between the parties here, and after they had produced their marriage certificate, with proof of cohabitation as husband and wife since its date, the presumption is that this marriage was a lawful one, and that the former marriage in Germany, if any such was established, had been dissolved.

"There was not any evidence in this case, so far as the bill of exceptions shows, that the first husband of Mrs. Klein was still living; but if this had been established, we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce, and that it was not incumbent on her, in this character of action and under the pleadings in this case, to produce a record of the judicial or legislative proceedings by which the divorce was effected."

And on page 263, Judge NAPRON further said:

"There was no proof that her first husband was living; and if there had been, the woman was still entitled to the charitable presumption that a divorce from her first husband had enabled her to marry a second time. But the court directed the jury to presume the invalidity of the second marriage, unless proof positive of a dissolution of the first was produced."

In the case of *Waddingham v. Waddingham*, 21 Mo. App. 609, a case on the facts very much like the case at bar, as the wife was shown to have been previously married to one Charles Gavin, ELLISON, J., after citing and quoting from the Klein case, *supra*, and speaking of the Klein case, and the one he then had under consideration, says:

"I can see no escape of plaintiff's case from the reasoning in that case. Here Charles Gavin is shown to be still alive, yet the Supreme Court maintains that so strong is the presumption of innocence as to the

second marriage proven in fact, that the law will infer the first was dissolved. So, then, if we concede all plaintiff maintains as to the sufficiency of his proof to establish a marriage between defendant and Charles Gavin, yet an actual marriage with plaintiff being conceded, the presumption in favor of defendant's innocence will raise the inference that her marriage with Gavin was dissolved."

In the later case of *Leech v. First National Bank*, 99 Mo. App. 1. c. 684, ELLISON, J., says:

"Ordinarily a deposit of money by a third person to the credit of another, being for his benefit, will be presumed to have been accepted by him. But this is only true of a lawful transaction. It is not true where the presumption would establish an unlawful act, or participation in an unlawful act. *For the primary presumption is always in favor of innocence.* . . . This, though things once shown to exist *are presumed to continue.* But if their continuance would develop a crime, the presumption would cease and be succeeded by one of innocence. Thus, if it be shown that a man and woman were married and lived together as husband and wife, and one of them is shown to have afterwards married another person, on a trial for bigamy the presumption of innocence will overcome the presumption of the continuance of the former marriage, and it will be assumed, in lack of other evidence, that the first marriage was, in some way, dissolved. The cases on this head are discussed in *Waddingham v. Waddingham*, 21 Mo. App. 628-631. And an apt illustration of the power of the presumption of innocence to overcome other presumptions is found in *Klein v. Laudman*, 29 Mo. 259."

On the other hand, we have the doctrine of the *Klein* case criticised by the St. Louis Court of Appeals, by BARCLAY, J., in case of *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1. c. 17, where he says:

“In a number of instances, instructions have been condemned for telling the jury in negligence cases that the law presumes every man to exercise ordinary care, or equivalent language expressing as a rule of law the idea that the conduct of an intelligent person is presumed to be in conformity to law until the contrary is shown. That rule is declared to be a ‘presumption of law’ in *Klein v. Laudman*, 29 Mo. 259. But the statement of it in the form aforesaid has been held erroneous in a number of cases, some of which we mention, more could be cited. [*Palmer v. Railroad*, 76 Mo. 221; *Myers v. City*, 108 Mo. 480; *Lynch v. Railroad*, 112 Mo. 420; *Schepers v. Railroad*, 126 Mo. 665; *Nixon v. Railroad*, 141 Mo. 425.] These decisions are all positive authority for the proposition that in the face of evidence permitting an inference contrary to a disputable presumption, it is not correct to throw the presumption into the scale, as it is said, in giving the law to the triers of fact.”

Outside of Missouri there are cases upholding the *Klein* case. One of these is the case of *Hunter v. Hunter*, 111 Cal. 261, 31 L. R. A. 411. In that case Mrs. Hunter had first married a man by the name of Joseph Milam in February, 1858, she being then fifteen years of age. She lived with Milam ten days when she was taken away by her parents. In July, 1862, she married Hunter and lived with Hunter for 22 years or more when Hunter brought suit to have the marriage with him declared void. In that case, TEMPLE, J., says:

“But it is said the marriage of the parties to this suit took place only about four and one-half years after the marriage to Milam, and it will be presumed that Milam was alive, in the absence of proof to the contrary. There was no proof tending to show that Milam was dead, or that his chance of life was below the average; therefore, it is contended the court should have found that he was alive. This presumption of the

continuation of life, is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. [Code of Civ. Proc., sec. 1963.] There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage.”

The latter part of the above quotation goes to the exact question raised on the instruction in this case, i. e., where is the burden of proof placed.

In *Schuchart v. Schuchart*, 61 Kan. 597, 50 L. R. A. 180, *JOHNSTON, J.*, cites the *Klein* case with these remarks:

“The marriage in this case, as we have seen, was formally celebrated, and as every presumption of the law is in favor of matrimony, the burden is on the plaintiff to show illegality, even though it may involve the proving of a negative. To establish his case, the plaintiff was therefore required to prove, not only that *Porteous* was living, but that the marriage relation of the defendant with him had not been dissolved by divorce. He did show that *Porteous* was still living, but failed to show that a divorce had not been granted to *Porteous* from her. [*Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *Klein v. Laudman*, 29 Mo. 259; *Hadley v. Rash*, 21 Mont. 170, 53 Pac. 312.]”

Another case citing and quoting from the *Klein* case is that of *Boulden v. McIntire*, 119 Ind. 574, 12 Am. State Rep. 453. In this case *Limes*, the first hus-

band of Mrs. Boulden, was alive and at the trial. The former marriage to Limes was conceded. The second marriage was within seven years. In the Boulden case, **CORREY, J.**, says:

“In the absence of proof to the contrary, it would undoubtedly be presumed, in favor of the validity of her marriage with Boulden, that Limes was dead. In the absence of any showing to the contrary, what reason can be assigned, under the circumstances, for not presuming that the marriage relation between her and Limes had been dissolved by a legal divorce before her last marriage?

“It is urged that to require the appellants to prove that Eliza Street had not been divorced from Charles Limes prior to the date of her marriage with Boulden would be requiring them to prove a negative. As we have seen from the authorities above cited, the law requires the party who asserts the illegality of a marriage to take the burden of that issue and prove it, though it may involve the proving of a negative.”

This case like the case from California fixes the burden of proof.

Leaving for the present those cases wherein the Klein case is cited, approved and applied, let us take up a few of the cases where the facts are somewhat similar to the case at bar, and see what the courts are holding. The first among the number is *Coal Run Coal Co. v. Jones, Admr.*, 127 Ill. 379, 8 N. E. 865. Mary Jones, Admr., an alleged widow of Thomas D. Jones, brought action for the death of Jones, which occurred November 19, 1883. One Mary Evans was offered as a witness for the Coal Company. The marriage of Mary Jones to Thomas D. Jones, deceased, in La Salle county, Illinois, February 19, 1875, was practically conceded. The witness Mary Evans testified that she was married to Thomas D. Jones, November 16, 1867, in Wales; that Jones deserted her and that she subse-

quently married Evans and lived with him as his wife; that she was never divorced from Jones. This evidence was excluded. The court says:

"This evidence was excluded. It is contended it should have been received, as showing that Mary Evans, and not the plaintiff, was the lawful widow of Thomas D. Jones, and that the facts of this case distinguish it from *Conant v. Griffin*, 48 Ill. 410, where there was an attempt to show that another one than the plaintiff there was the true widow of deceased and it was held that which one was the true widow was immaterial; that that fact would only become important when the administrator was called upon to make distribution. It is claimed that here it is important which one is the true widow, as Mary Evans, by her conduct, had absolved the deceased from any legal liability for her support, and that she had sustained no pecuniary injury by his death. However this may be, we think the evidence was properly excluded, as not showing the invalidity of the second marriage of Jones. The second marriage being shown in fact, the law raises a strong presumption in favor of its legality, which we do not regard as overcome by mere proof of a prior marriage, and that the first wife had not obtained a divorce. [See *Johnson v. Johnson*, 114 Ill. 617, 3 N. E. 232.] The husband might have obtained such divorce, and left him free to contract the second marriage."

In *Johnson v. Johnson*, 114 Ill. 617, cited in the foregoing case, the court, per *SHOPE, J.*, said:

"But if the law raises the presumption that the former husband was alive at the date of the last marriage, from the fact that seven years had not then elapsed since the last knowledge of him, it also, in the absence of proof to the contrary, presumes that the parties, in contracting such marriage, and in subsequently cohabiting, were innocent of immorality or crime, and

that there was no legal impediment to its consummation. When a marriage is shown in fact, the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid. [Bish., Mar. & Div., secs. 457, 458.] Presumptions of this class are not conclusive, but are sufficient, in general, to shift the burden of proof. [1 Greenleaf, Ev., secs. 33-35.] These presumptions of innocence, and of the validity of the marriage, conflict with the presumption of life; and if neither presumption is aided by proof of facts or circumstances co-operating with it, the presumption of the validity of the marriage has generally been held to be the stronger, and to prevail over the presumption of the continuance of the particular life; and this is so held although the time elapsing between the last knowledge of the former husband and the second marriage is much less than seven years."

As to the burden of proof the doctrine is thus announced in 19 Am. and Eng. Ency. of Law (2 Ed.), 1209:

"As a result of the doctrine that all presumptions are in favor of marriage, the invalidity of a marriage cannot be established like any other question of fact, as every presumption must be overcome by satisfactory proof. The burden of proof is always on the party attacking the validity of the marriage."

And further, upon the same page, the author says: "The party having the burden of proof must overcome every presumption in favor of the marriage alleged to be invalid, even though this may require the proof of a negative."

On the question of burden of proof, even though it require the proof of a negative, the Supreme Court of the United States through Justice WAYNE, in the case of *Patterson v. Gaines et ux.*, 6 How. 1. c. 598, says: "But there is no force in this objection for

another reason. When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is, that a child of the marriage is legitimate, and it will be incumbent upon him who denies it to disprove it, though in doing so he may have to prove a negative."

In cases of the character involved in this record, the following cases declare in favor of the presumption of divorce, although there may be evidence of a former valid marriage: *Johnson v. Johnson*, 114 Ill. 611; *Boulden v. McIntire*, 119 Ind. 574; *Blanchard v. Lambert*, 43 Iowa 228; *In re Edwards*, 58 Iowa 431; *Leach v. Hall*, 95 Iowa 611; *Parsons v. Grand Lodge*, 108 Iowa 6; *Hull v. Rawls*, 27 Miss. 471; *Klein v. Laudman*, 29 Mo. 259; *Hadley v. Rash*, 21 Mont. 259; *Carroll v. Carroll*, 20 Tex. 731; *Coal Run Coal Co. v. Jones*, 127 Ill. 379; *Harris v. Harris*, 8 Ill. App. 57; *Cartwright v. McGown*, 121 Ill. 388.

Along the same line, in *Hynes v. McDermott*, 91 N. Y. l. c. 459, 43 Am. Rep. 677, it is said: "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

And Lord LYNCHBURST in *Morris v. Daviss*, 5 Clark & F. 163, says: "The presumption of law (the presumption of the validity of a marriage shown) is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

And Lord CAMPBELL said in *Piers v. Piers*, 2 H. L. Cas. 331, it could only be negated, "by proving every reasonable possibility." In *Harris v. Harris*, 8 Ill. App. l. c. 63, the court says:

“When it is shown that a marriage has been consummated in accordance with the forms of the law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations, and the fact, if shown, that either or both of the parties have been previously married, and, of course, at a former time having a husband or wife living, does not destroy the prima-facie legality of the last marriage. The natural inference in such case is, that the former marriage has been legally dissolved, and the burden of showing that it had not been rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that the former marriage has been dissolved, either by the death of their former consort or by a decree of court, in order to protect themselves against a bill for a divorce or a prosecution for bigamy.”

Along the same line fall the cases of *Yates v. Houston*, 3 Tex. 433; *Dixon v. People*, 18 Mich. 84; *Greensborough v. Underhill*, 12 Vt. 604.

On the other hand, there are cases against this proposition, such as *Williams v. Williams*, 63 Wis. 58; *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105; *Wilson v. Allen*, 108 Ga. 275. Several others are cited, but are not exactly in point.

At the argument of this cause, we are frank to state that upon this instruction number 4, we were of opinion that the trial court was in error. But an examination of the authorities has convinced us to the contrary.

Under the weight of authority, the second marriage, when shown to have been legally entered into, that is, in due form of law, is clothed with every presumption of validity. Such is the doctrine announced by Bishop. If its validity is attacked, the burden of proving the invalidity is upon the party attacking it. And if in assuming this burden, which the law demands,

it becomes necessary to prove a negative, he must do so. The law presumes death after seven years, why not presume divorce? The courts seem to look upon the presumption of innocence as the stronger and greater presumption, and in order to sustain the presumption of innocence, will indulge the presumption of divorce, rather than find the party guilty of bigamy. To say the least, the weight of judicial opinion places with the party attacking the burden of proving the invalidity of the second marriage. This is all the instruction required.

Again, the facts of the case are not specially inviting to a strained construction. The first wife for nearly ten years was living with another man, by whom she evidently had two children. She settled with defendants for \$100, and hardly thought she was entitled to that sum. She made no claim to more and upon the receipt of the \$100 agreed to and did testify. It is true that upon hearing of the death of Johnson, a year afterward, she married the man with whom she had been living for ten years, using the \$100 paid her by defendants for that purpose.

But without going into further detail we are of opinion that there was no error upon the part of the trial court in giving said instruction. The presumption of innocence, which is stronger than all counter presumptions in such cases, casts the burden of proof upon the party denying the validity of the marriage, even to the extent of proving a negative. This in no way conflicts with the recent case of Snuffer v. Karr, 197 Mo. 182, for the reason that in the Snuffer case, it was an admitted fact that there had been no dissolution of the first marriage. The case was so argued and so presented. The validity of the first marriage was attacked, but if found to be valid, its non-dissolution was a conceded point. This being true, there was no place for presumption of divorce.

V. Plaintiff's instruction numbered 1 is vigorously assailed by the defendants. This instruction is as follows:

"The court instructs the jury that if they believe from the evidence that John C. B. Johnson at the time he was killed was the husband of the plaintiff, and that this suit was brought within one year after a suit was instituted against the defendants and that the suit that was dismissed was instituted against the defendants within six months after the death of John C. B. Johnson; and the jury further find from the evidence that the defendant, Atchison, Topeka & Santa Fe Railway Company, was operating a passenger train over and upon the railroad tracks and right of way of the St. Joseph Terminal Railway Company under and by virtue of a traffic arrangement or lease from said St. Joseph Terminal Railway Company; and the jury further find from the evidence that plaintiff's husband was a section hand in the employ of the St. Joseph Terminal Railway Company, and as such was engaged in the performance of his duties, on or about the track being used by, and over which said passenger train was being moved, and that the plaintiff's husband did not see said train or know of said train being operated or moved on said track at the time he was injured, and the jury further find from the evidence that the defendants were moving said train on said track at a rate of speed in excess of five miles per hour, and that said train was moving along said track towards plaintiff's said husband and that the agents and servants in charge of the operation of said train did not warn plaintiff's said husband of its approach by ringing the bell, and that said servants, agents and employees saw plaintiff's said husband on the track, or by the exercise of ordinary care could have seen him in time to have stopped said train before it struck him and thereby have avoided the injury, and did not do so, that is,

did not stop it, or that said agents, servants and employees saw plaintiff's said husband, or by the exercise of ordinary care could have seen him in time to have warned plaintiff's said husband and thereby have avoided the injury, and did not do so, that is, did not so warn him, if you believe plaintiff's said husband was injured, and that said train was being operated within the corporate limits of the city of St. Joseph, then your verdict must be for the plaintiff.

"In this connection the court instructs you that it is your duty, and you must read all the instructions in the case together, and especially is this true in regard to this instruction, and those given for the defendant stating the rights and duties of the deceased, and of the agents and servants of the defendants."

The gist of the objection is that the instruction is one covering the whole case, and leaves out the question of whether or not plaintiff's husband was, at the time, in the exercise of ordinary care and prudence, in looking out for the train, or in other words leaves out the question as to whether or not the deceased was guilty of contributory negligence.

It would have been much better for the plaintiff, upon one theory of this case, to have incorporated this element in this instruction, but upon the theory of the "humanitarian doctrine" contributory negligence is eliminated from the case, and there was no necessity of incorporating it.

But by instructions 6 and 14 given for the defendants, the doctrine of contributory negligence is fairly given, if not in other instructions given for defendants. Also in instructions 2, 4, 7, 8 and 12, modified by the court and given. From the modifications made in each of these instructions, which is in words, "without you find the facts to be as stated in instruction number one, given for plaintiff," it is evident the trial court was giving instruction number 1 on the theory of the

"humanitarian doctrine." There is ample evidence to support an instruction upon this doctrine. The evidence shows that this train could have been stopped within thirty feet, and the custom of the men was to leave the track when the train got within seventy-five or one hundred feet of them. Grant it to be true that deceased was negligent, yet the train men, under plaintiff's evidence, must have known of this custom of section men to withdraw from danger seventy-five or one hundred feet from the approaching train. If this was the custom, and the train men knew it, which they are presumed to have known, then they could have seen plaintiff's husband in a place of known and imminent danger in time to have averted it, either by stopping the train, or awakening him from his lethargy by a shrill sound of the whistle, neither of which was done. Again, the last clause of this instruction specifically directs the jury to consider defendants' instructions as to the duties of deceased.

On the whole, we think the instructions presented the case as fairly for the defendants as could be asked.

VI. In the reply brief the defendants raise for the first time the following proposition:

"Plaintiff having alleged a cause of action based upon a joint control of the servants and agents operating the train in question, must stand upon the cause of action as alleged, and will not be permitted to invoke any statements upon which the pleadings are not based, and the proof failing to show any such joint control, there was a fatal variance between the allegations and the proof, and plaintiff is not entitled to recover against either defendant."

This question was not raised in the original brief, and does not seem to have been urged in the court below. It would be a sufficient answer thereto to say that the point was not timely raised. But going beyond this, there is evidence tending to show that the train

inflicting the injury was under the joint control of both defendants. The record shows that the servants of the Santa Fe Company had to await the signal of the pilot, an employee of the Terminal Company, before they could proceed over the identical track where deceased was killed. They proceeded to pass over this track upon the signal of the Terminal Company's agent that morning.

But beyond all this, the petition charges the use of the tracks of the Terminal Company by the Santa Fe Company; it charges the fact that the former is a Missouri corporation and the latter a foreign corporation; it charges further a traffic arrangement between the two, which when introduced in evidence amounts to the leasing of the tracks of the Terminal Company, the Missouri corporation, to the Santa Fe Company, a Kansas corporation. This would make them jointly liable under our statute.

Other points made have been duly examined but not found of such character as to require specific notice here.

The only question we have had about this case was the propriety of instruction numbered 4 for plaintiff, herein above discussed. Having reached the conclusion we did upon that point, we have no hesitancy in saying that the case has been fairly tried and the judgment should be and is affirmed.

All concur, except *Woodson, J.*, not sitting.

HADLEY, Attorney-General, Appellant, v. ZEILDA FORSEE.

Division One, April 11, 1907.

1. **CHARITY.** Gifts to charitable uses receive favorable consideration in the courts of this State.
2. ———: **Public:** Uncertainty as to the individual to whom the benefit may reach does not defeat the gift, but on the contrary is one of the features that distinguish a public from a private charity. But it is not every general intent that appears in a will that can be put into effect by a court of chancery.
3. ———: ———: ———: **Cause of Religion: No Specific Beneficiary.** Though a general intent to advance the cause of religion and promote the cause of charity appear in the will, yet in the absence of any provision showing how that purpose is to be put into effect, the court is powerless, and the testator will be held to have died intestate as to the property or fund. If he does not designate the particular religion or the particular charity he had in mind, the court will not make a will for him by assuming to designate the church or charity he had in mind.
4. ———: ———: **This Will: Uncertainty.** The will gave all testator's property to his wife for life, "subject to the following conditions: The balance of my said property will be given to advance the cause of religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes." *Held*, that the testator gave the courts to understand that he had confided to his wife his purpose as to the particular church or charity he had in mind, and she being dead there is no such trust for a charitable or religious use created in the will as a court of chancery can enforce.

Appeal from Buchanan Circuit Court.—*Hon. Henry M. Ramey, Judge.*

AFFIRMED.

J. W. Boyd and Brown & Dolman for appellant.

(1) In support of the general rule that trusts for public charitable purposes are favored by the courts,

are always construed as valid where it is possible to do so, and are often upheld where private trusts would fail, see: *Sappington v. Trustees*, 123 Mo. 42; *Hesketh v. Murphy*, 36 N. J. Eq. 309; *Jackson v. Phillips*, 14 Allen 550; *Handley v. Palmer*, 103 Fed. 43; *Stewart v. Easton*, 74 Fed. 854; *In re Willey (Cal.)*, 56 Pac. 550; *Woodruff v. Marsh*, 63 Conn. 136; *Colt v. Comstock*, 51 Conn. 377; *Am. Academy, etc., v. Harvard College*, 12 Gray 596. Although there is no express devise to the trustees, if, from the nature of the duties to be performed, it appears that the taking of an estate is necessary, the intention of the testator will be presumed; and when that intention is clear, an estate in the trustees will vest by implication. 1 *Beach on Trusts*, sec. 323; 1 *Perry on Trusts*, sec. 249; *Fay v. Taft*, 12 Cush. 450; *Claypool v. Norcross*, 42 N. J. Eq. 546; *Hoeffer v. Cloghan*, 171 Ill. 467; *Campbell, Ex'r, v. Clough*, 71 N. H. 181. (2) The thing becomes a charity only when the uncertainty of the recipient begins. Uncertainty is an essential element of a valid trust for charity. For instance, a gift to a trustee to support a poor person would be a simple private trust, while if it was to support such poor persons of the State as the trustee might select, it would be a valid trust to a charitable use. *Chambers v. St. Louis*, 29 Mo. 590; *Sappington v. School*, 123 Mo. 41; *Howe v. Wilson*, 91 Mo. 51; *Handley v. Palmer*, 103 Fed. 43; *Weber v. Bryant*, 161 Mass. 403; *State v. Griffith*, 2 Del. Ch. 392; *Hinkley's Estate*, 58 Cal. 547; *Pennoyer v. Wadhams*, 20 Ore. 278; *Hunt v. Fowler*, 121 Ill. 281; *Sowers v. Cyrenius*, 39 Ohio St. 29; *People v. Cogswell*, 113 Cal. 136; *Schleicher's Estate*, 201 Pa. St. 612; *D. & F. Missionary Soc. Appeal*, 30 Pa. St. 535. In the following cases charitable trusts of precisely the same general character as that created by the Corby will have been sustained and enforced by the courts: *Powell v. Hatch*, 100 Mo. 592; *Minno v. Billings*, 183 Mass. 126; *Salton-*

stall v. Sanders, 11 Allen 446; Weber v. Bryant, 161 Mass. 400; Wells v. Doane, 3 Gray 203; Estate of Hinckley, 58 Cal. 457; Everett v. Carr, 59 Me. 325; Fox v. Gibbs, 86 Me. 87; White v. Ditson, 140 Mass. 351; Brown v. Kelsey, 2 Cush. 243; Claypool v. Norcross, 42 N. J. Eq. 545; In re Stewart's Estate (Wash.), 66 Pac. 148; Schouler, Petitioner, 134 Mass. 426. Also the following so nearly similar in facts as not to be distinguishable in principle: Howe v. Wilson, 91 Mo. 45; Sappington v. School Trustees, 123 Mo. 40; Barkley v. Donnelly, 112 Mo. 571; Chambers v. St. Louis, 29 Mo. 543; People v. Cogswell, 113 Cal. 129; Going v. Emory, 16 Mass. 107; Fay v. Howe, 136 Cal. 599; Board v. Culp, 151 Pa. St. 467; Miller v. Teachout, 24 Ohio St. 525; Quinn v. Shields, 62 Iowa 129; Haynes v. Carr, 70 N. H. 463; Grant v. Sanders, 95 N. W. 411; Attorney-General v. Wallace, 7 B. Mon. 611. These lists could be extended indefinitely. A devise "to advance the cause of religion" constitutes a valid charitable use. As said by Mr. Justice GRAY, in Fairbanks v. Lamson, 99 Mass. 533, "No object is more clearly charitable in the sense of the law, than the advancement of religion." Schmidt v. Hess, 60 Mo. 593; Miller v. Teachout, 24 Ohio St. 525; St. G. C. Soc. v. Branch, 120 Mo. 238; Jackson v. Phillips, 14 Allen 552; Simpson v. Welcome, 72 Me. 496; Bank v. Longfellow, 96 Mo. App. 392; Quinn v. Shields, 62 Iowa 129; Beckwith v. St. Phillips, 69 Ga. 564; 2 Perry on Trusts, secs. 687 and 701; Alden v. St. Peter's Parish, 158 Ill. 631; Mack's Appeal, 71 Conn. 135; Andrews v. Andrews, 110 Ill. 223; Attorney-General v. Wallace, 7 B. Monroe 611; Morville v. Fowle, 144 Mass. 110; Trafton v. Black, 187 Ill. 36; Hoeffer v. Clogon, 171 Ill. 462; John v. Smith, 91 Fed. 827; Pennoyer v. Wadhams, 20 Ore. 280; Hood v. Dorer, 107 Wis. 149; Gass v. Wilhite, 2 Dana 170. The support and propagation of religion is clearly a charit-

able use. 2 Pomeroy's Equity, 1021; Pennoyer v. Wadhams, 20 Ore. 281; 2 Perry on Trusts, sec. 701; Price v. Maxwell, 28 Pa. 23. Nothing seems to be better settled than that a bequest for the promotion of religious and charitable uses and enterprises is valid even though there be no trustee appointed to carry it into effect; and, in such a case, the heir at law or the executor, as the case may be, becomes the trustee, or one will be appointed by a court of equity. In such case charity is the substance of the gift and if the mode in which it shall take effect be inadequate, a court of equity will supply the deficiency. Brown v. Kelsey, 2 Cush. 243; Winslow v. Cummings, 3 Cush. 358; Washburn v. Sewall, 9 Met. 280; Burbank v. Whitney, 24 Pick. 146; Grand Prairie v. Morgan, 171 Ill. 452; Hoeffler v. Clogon, 171 Ill. 472; Schmidt v. Hess, 60 Mo. 595; Mo. Historical Soc. v. Academy, 94 Mo. 466; Matter of Upham, 127 Cal. 90; Carpenteria v. Heath, 56 Cal. 478; Howard v. Am. P. Soc., 49 Me. 302; Wilson v. Towle, 36 N. H. 129; Stevens' Estate, 200 Pa. St. 318; Frazier v. St. Luke's, 147 Pa. St. 246; Hood v. Dorer, 107 Wis. 153; Mormon Church v. United States, 136 U. S. 57; Sawtelle v. Witham, 94 Wis. 416; Brown v. Pancoast, 31 N. J. Eq. 325; 1 Perry on Trusts, sec. 249; Darcy v. Kelley, 153 Mass. 437; Bliss v. Am. Bib. Soc., 2 Allen 337; Pell v. Mercer, 14 R. I. 412; Wood v. Paine, 66 Fed. 809; St. Peter's Church v. Brown, 21 R. I. 367; Attorney-General v. Goodell, 180 Mass. 538; Chapin v. School Dist., 35 N. H. 445; Schouler, Petitioner, 134 Mass. 426; Fay v. Howe, 136 Cal. 599; Phillips v. Harrow, 93 Iowa 92; Campbell v. Clough, 71 N. H. 181; Bruere v. Cook, 63 N. J. Eq. 624.

Eastin, Corby & Eastin and Scarritt, Scarritt & Jones for respondent.

(1) (a) The will of John Corby has been fully construed by this court in *Corby v. Corby*, 85 Mo. 371. The

exact questions presented by this appeal were presented to the court in that case, and they have been decided adversely to appellant's claim. The will has been judicially interpreted and that interpretation will not be disturbed. *Wilson v. Beckwith*, 140 Mo. 359; *Dunklin County v. Chouteau*, 120 Mo. 577; *Biglow v. Tilden*, 65 N. Y. Supp. 140; *Bright v. Esterly*, 199 Pa. 88; *Dugan v. Collins*, 13 Md. 149; *Henderson v. Rost*, 11 La. Ann. 541; *McCormick v. Bauer*, 122 Ill. 573; *Spencer v. King*, 5 Ohio S. & C. P. Dec. 113; *Nininger v. Carver County*, 10 Minn. 133; *Whitmore v. Cope*, 11 Utah 344; *Smith v. Eby*, 56 U. S. (15 How.) 137; *Mitchell v. Burlington*, 71 U. S. 270; *Levi v. Nitsche*, 40 La. Ann. 600; *Forwarding Co. v. Mahaffey*, 36 Kan. 157; *Long v. Long*, 79 Mo. 644; *Drug Co. v. Raymond*, 59 Neb. 157. (b) The decision in *Corby v. Corby* was rendered twenty-two years ago. The parties and the public have acted upon it. It has become a rule of property and will be allowed to stand. *Reed v. Owenby*, 44 Mo. 204; *Wilson v. Beckwith*, 140 Mo. 359; *Dunklin Co. v. Chouteau*, 120 Mo. 577; *Bennett v. Bennett*, 34 Ala. 53; *Linn v. Minor*, 4 Nev. 462; *Thomas v. Greenwood*, 6 Ohio Dec. 639; *Bank v. Alcorn*, 53 Pac. 813; *Brader v. Brader*, 110 Wis. 423; *Nickels v. Commonwealth*, 23 Ky. Law Rep. 778. (2) That clause of the will which provides "that the balance of my said property will be given to advance the cause of religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes," does not constitute a valid gift to charitable uses. First. It is so vague and uncertain, so general and undefined, that the court will not attempt to enforce it. *Corby v. Corby*, 85 Mo. 371; *Schmucker's Estate v. Reel*, 61 Mo. 592; *Briggs v. Penny*, 3 De Gex, 7 Sm. 525; *Corporation of Gloucester v. Osborn*, 1 H. L. Cas. 272; *Morice v. Bishop of Durham*, 9 Ves. 399; *Norcross' Adm'rs v.*

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Murphy's Ex'rs, 44 N. J. Eq. 552; Heiss v. Murphy, 40 Wis. 276; White v. Atty.-Gen., 39 N. C. 19; Bridges v. Pleasants, 39 N. C. 26; Webster v. Morris, 66 Wis. 366; Rizer v. Perry, 58 Md. 112; Owens v. Missionary Soc., 14 N. Y. 380; Reeves v. Reeves, 73 Tenn. 644; Carpenter v. Miller, 3 W. Va. 174; Board of Missions v. McMaster, Fed. Cas. 1586; Church v. Smith, 56 Md. 362; Goddard v. Pomery, 36 Barb. 546; Rose v. Hatch, 125 N. Y. 427; Fairfield v. Lawson, 50 Conn. 501; Williams v. Williams, 8 N. Y. 525. Second. The testator's wishes are not expressed in the will and are, therefore, no part of it. The court has no power to make a new will for him. Drake v. Crane, 127 Mo. 102; Howe v. Wilson, 91 Mo. 51; Schmucker's Estate v. Reel, 61 Mo. 598; Catlett v. Catlett, 55 Mo. 330; R. S. 1865, sec. 3, ch. 131; Corby v. Corby, 85 Mo. 397.

VALLIANT, P. J.—This is a suit in equity by the Attorney-General to establish and enforce what is alleged in the petition to be a trust for public charity created by the will of John Corby, deceased, who died in 1870 leaving a large estate, real and personal, leaving also a widow but no child or other descendant. It is claimed in the petition that by the will the widow was given a life estate in the whole property and the remainder was devised in trust for public charity. The will is copied in the petition in full, and the judgment to be pronounced in the case is to be based on the interpretation to be given the will.

This will came before this court some years ago for interpretation and the judgment of the court then was that the will gave the widow a life estate but made no disposition of the remainder, that is, that except as to the life estate to the widow, John Corby died intestate. [Corby v. Corby, 85 Mo. 371.] That suit was between the heirs at law of John Corby on the one side and the widow on the other; there was no party in

the case representing the general public, claiming that the will created a trust for public charity. After the decision in that case the heirs at law conveyed their interests in the estate to the widow, who thereupon assumed the absolute ownership of the whole property and, as the petition in this case states, sold large parts of the real estate, appropriated the proceeds to her own use and reinvested part of the same in other real estate, taking the title in her own name. The widow died in 1899 leaving the defendant, her sister, her sole heir at law.

The petition in this case, after setting out the will in full, states the plaintiff's theory of its legal effect, that is, that after the life estate to the widow the remainder was given in trust for charity; the defendant filed a general demurrer to the petition, the court sustained the demurrer, and plaintiff declining to plead further judgment for defendant was rendered and the plaintiff appealed.

The decision in *Corby v. Corby*, above mentioned, was rendered in 1884 — nearly twenty years before the filing of this suit. In view of the fact, as the petition informs us, that in those years there have been many sales and transfers of property belonging to the Corby estate we should be careful to say nothing in this case to impair titles taken on the faith of the decision in that case unless it becomes necessary in order to protect some interest that was not bound by that decision. What was decided therefore in that case, as between the parties to that suit and their privies, we will take as the law in this case and we will now consider only the question as to whether a trust for charity is created by the will.

The will is in these words:

“In the name of God, amen! I, John Corby, of the city of St. Joseph, county of Buchanan and State of Missouri, being of sound mind and clear memory,

and being fully aware of the uncertainty of life and the certainty of death, and being desirous of disposing of all my worldly goods and effects in such manner as I believe to be just and equitable, do declare the following to be my last will and testament.

“I do will and bequeath to my dearly beloved wife Amanda Corby, all my property of every kind that I am possessed of, both real, personal and mixed, including all my lands, lots, tenements, improvements, hereditaments wherever situated; also I do hereby will and bequeath to my said wife Amanda Corby, all of my money, notes, bonds, bank stock, insurance stocks, or any other evidence of debt and of money or property of every kind of character whatever, which I own or have any claim to, to have and to hold the same to her own use and benefit during her natural life, subject to the following conditions:

“First. That she will pay all of my just debts; secondly, that after providing for her own wants and comforts, I leave to the discretion of my dear wife to give to such of my relations such aid or assistance as my dear wife may, of her own will, think proper and just, hereby declaring that my relations have no claim of any kind upon me or upon any of my property, and anything that they may receive from my said wife, out of my effects, shall be in accordance with her sense of justice and in accordance with my wishes, the nature of which she has been advised by me during my life.

“Secondly. That the balance of my said property will be given to advance the cause of religion, and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes.

“Thirdly. For the purpose of enabling my dearly beloved wife to more effectually carry out my wishes in reference to the disposition of my property, as aforesaid, she is hereby authorized and empowered to lease,

sell or convey any of my said property, which she may think will be beneficial to said property, by leasing or selling the same."

As was said in the former case commenting on the general frame of the will: "It is said that this will was written by the testator himself. It is evidently the work of an unpracticed hand, and of a mind untrained to habits of precise and consecutive thought, or weakened by age or disease. It contains an abundance of legal terms and phrases, but the ideas expressed are indistinct and confused, and there is hardly a sentence in it that is not inconsistent with some other provision." After a labored consideration, with the aid of distinguished counsel, the only thing this court in that case could make out of the jumble was a life estate to the widow in all the property. One of the judges was of the opinion that in addition to the life estate there was a power of disposition given to the widow, but the majority held that as to the corpus of the estate John Corby died intestate.

At the end of the only clause in the will which purports to grant an estate are these words: "subject to the following conditions." Then follow two paragraphs the first directing his debts to be paid and authorizing the widow to give as she may see fit of his estate to his relations, and, "Secondly—That the balance of my said property will be given to advance the cause of religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes." It is upon that second paragraph that the plaintiff's case rests.

Gifts to charitable uses have always received favorable consideration in this court, as the cases cited by counsel for the plaintiff show. [Chambers v. St. Louis, 29 Mo. 543; Academy of Visitation v. Clemens, 50 Mo. 167; Schmidt v. Hess, 60 Mo. 591; Howe v. Wil-

son, 91 Mo. 45; Mo. Hist. So. v. Academy of Science, 94 Mo. 459; Powell v. Hatch, 100 Mo. 592; Barkley v. Donnelly, 112 Mo. 561; Sappington v. Trustees, 123 Mo. 32; Lackland v. Walker, 151 Mo. 210.]

The law is, as contended by counsel for plaintiff, that uncertainty as to the individual to whom the benefit may reach does not defeat the gift but on the contrary is one of the features that distinguish a public from a private charity.

It has been said that this distinction is illustrated in the Book of Ruth by the custom of the harvesters leaving at random in the field a sheaf for the gleaners who would come after, but not knowing which one of them would get the leaving. In that case although it was not known which individual would get the sheaf, yet it was known that a class of poor gleaners would come after the harvesters had passed; it was charity for that class that prompted the good deed and when one or some of that class received the benefit the purpose of the particular charity intended was effected.

But there are many objects of charity in every community, some of them are regarded with favor by one benevolent person and with disfavor by another. There are deserving poor and undeserving poor and whether one falls within one class or the other is often a matter of individual opinion.

A man who gives of his wealth to relieve the suffering of fellowmen of a class whom he regards as worthy is to be adjudged as actuated by a charitable intent, and that is so even though he especially limits his benevolence to that class. It is not necessary that a man's charity should be aimed impartially to all suffering mankind in order to credit him with a charitable intent, nor is he to be adjudged as having intended to bestow his bounty on every sufferer, without regard to class or condition, merely because he has manifested a charitable intent in a certain direction.

And what is here said of a charitable purpose is equally true of a religious purpose. There are many kinds of religion, and religious men are generally very particular about the kind. What is religion in the estimation of one is superstition in the estimation of another. There are men who give largely to the support of one church who would regard it as evil to aid the support of another. John Corby in this clause of his will which we are now considering says: "the balance of my said property will be given to advance the cause of religion," etc. What kind of religion—Catholic, or Protestant? The will does not say, yet it manifests an intent to advance the cause of religion, and if the chancellor should undertake to enforce that purpose he would have as broad a field to gather from as he would if he should undertake to carry out the charitable intent.

It is not every general intent that appears in a will that can be put into effect by a court of chancery. For example, the purpose to disinherit an only heir may clearly appear, the testator may say in his will that he gives him one dollar and he is to have no more of the estate, yet unless the testator wills the property to some one else the heir will take it under the Statute of Descents. So in the case at bar: though a general intent to advance the cause of religion and promote the cause of charity appear, yet in the absence of any provision in the will showing how that purpose is to be put into effect the court is powerless. If in such case it should undertake to designate the church or charity to be benefited it would assume to do for the testator what he did not do for himself.

But the testator did not express in this will an intent to advance the cause of religion and promote the cause of charity in general, but he indicated a purpose to advance the cause of some particular religion and promote the cause of some particular charity but

he left us without information as to the particular religion or the particular charity he had in mind. He gives us to understand that he has confided his purpose in that respect to his wife and will be satisfied with whatsoever she may do. How is the court to know whether or not the wife is carrying out those directions, or, if at her death the court should appoint another trustee, who is to instruct him in his duties? The testator was not willing to put his property in a condition that a chancellor might give it to the advancement of any religious order he might select or any charity he might prefer. He trusted that matter to his wife alone and as she is now dead no one can ever know what his wishes in that respect were.

It is unnecessary to say whether or not the wife had any power at all under that clause of the will, as no act of hers under it is in question here; it is sufficient to say that there is no such trust for a charitable use created in the will as a court of equity can enforce.

The judgment is affirmed. All concur, except *Woodson, J.*, not sitting.

HENRY NAPOLEON BUNEL and F. S. HEFFERNAN, Appellants, v. NESTER et al.

Division One, April 11, 1907.

1. **RESULTING TRUSTS: Statute of Frauds: Evidence.** Implied trusts, whether they be such as are designated in the books as resulting trusts or those called constructive trusts, are taken out of the provisions of the Statute of Frauds. The proof of the existence of such trusts rests in parol.
2. ———: **Curator: Deed of Trust: Taking Title in Himself: Speculation on Ward's Money: Recital in Trustee's Deed.** A senior deed of trust on two pieces of property secured a loan thereon made by Mills and one made by the curator out of his ward's

funds; a junior deed of trust on the same property secured the curator's individual loan as well as one made by him for his ward. *Held*, that there was no principle of natural equity or written law that denied to the curator the privilege of bidding at the foreclosure sale in his own right, to protect himself as well as the ward and Mills. If he bid more than the ward's debt, and treated the purchase as his own and accounted to the ward for her loan, by charging himself in gross for all money coming into his hands originally as the curator of her estate, and there is absent any increment of gain to him by way of speculation on his ward's money in the purchase of the property, a narrative in the trustee's deed to him that he paid the purchase price is presumptively true, and he did not take the property in trust for the ward. And this conclusion is fortified by the fact that in his final settlement the curator treats the loans made out of his ward's estate as if paid to him and as left in the corpus of the trust estate.

3. ———: **Proof: Statement by Curator.** Disconnected parts of poorly remembered conversations between the deceased curator and the debtor whereby the curator is made to say on the date of the trustee's sale of the mortgaged property that he was bidding for his ward, are not sufficient to show that he took title for his ward—the rule being that where plaintiff relies for title on raising an implied trust, the proof should be so clear, unequivocal, cogent and impelling as to exclude every reasonable doubt from the chancellor's mind.
4. ———: ———: **This Case.** Giving force to the rule as to the character of proof required to establish an implied trust in property, and attending to the fact that both the trustee who sold the mortgaged property to the curator and the curator are dead, that the curator was solvent and possessed of large means and handled large sums, that the transaction in question was never questioned in his lifetime, that he treated the property purchased at the trustee's sale as his own and specifically disposed of it by will, and that the property was not specifically described in the ward's deed to plaintiffs, while other parcels of real estate were so described therein, it should be held that the proof was not sufficient to show that the curator bought the property at the trustee's sale for his ward.
5. ———: **Ward's Estate: Interest.** Under some circumstances interest should be charged to the curator on the money of his ward. But where the suit is to have a trust declared in her favor in property sold to him under a deed of trust given in part to secure a loan of her money and in part to secure a loan of his, and no claim is made that accrued interest was used towards paying a part of the purchase price, the pleadings are not in shape to authorize a consideration of the question.

Appeal from Greene Circuit Court.—*Hon. James T. Neville*, Judge.

AFFIRMED.

Barclay, Shields & Fauntleroy and *F. S. Heffernan* for appellants.

(1) Under the evidence the guardian and curator, and his heirs receiving the property from him, are undoubtedly liable in equity to his ward. A constructive trust or a resulting trust is immediately created by the conversion of the guardian, and he and his heirs hold the property as trustees for the true owner. *Huttman v. Viesselman*, 48 Mo. App. 582; *Douschroeder v. Thias*, 51 Mo. 100; *Kelley v. Johnson*, 28 Mo. 249; *Miller v. Davis*, 50 Mo. 572; *Plumb v. Cooper*, 121 Mo. 668; *Boyd v. Mammoth Spring Co.*, 137 Mo. 482; *Paul v. Chouteau*, 14 Mo. 580; *Shaw v. Shaw*, 86 Mo. 594; *In re Ferguson Estate*, 124 Mo. 574. (2) Under the circumstances there was a constructive trust created by the facts in equity, by which John O'Day was bound to account, for the property in his hands, to plaintiff. The property used by O'Day was originally the property of Henry N. Bunel. It was decreed out of him by a fraudulent decree of the New York Court. When that decree was set aside by the United States Circuit Court on the ground that it was fraudulently obtained and admitted by many to be so obtained by fraud, *eo instanti*, H. N. Bunel's rights to the fund in O'Day's hands were restored and O'Day held the fund for him as an equitable trust, and when he converted the property sued for, to his own use, he became liable to account to the real owner. *Patterson v. Booth*, 103 Mo. 402; *Green Tree Brewing Co. v. Dold*, 45 Mo. App. 603; *Gamble v. Gibson*, 59 Mo. 585; *Monroe v. Collins*, 95 Mo. 33; 1 *Perry on Trusts* (3 Ed.), sec. 27; *Bircher v. St. Louis Metal Co.*, 77 Mo. App. 500; *State ex rel. v.*

Elliott, 157 Mo. 609; Burford v. Aldridge, 165 Mo. 419; Bircher v. Walther, 163 Mo. 461; Pearson v. Haydell, 90 Mo. App. 253; Clark v. Bank, 57 Mo. App. 277; Harrison v. Murphy, 106 Mo. App. 465; Heil v. Heil, 184 Mo. 665; Garrett v. Garrett, 171 Mo. 155; Lincoln Trust Co. v. Wolff, 91 Mo. App. 133; State ex rel. v. Berger, 92 Mo. App. 631; Crawford v. Jones, 163 Mo. 577; Farrell v. Farrell, 91 Mo. App. 665; Mayer v. Bank, 86 Mo. App. 422; Meystedt v. Madden, 86 Mo. App. 178; Davis v. Hoffman, 167 Mo. 573; Keet v. Gideon, 80 Mo. App. 609; Nuggles v. Callison, 143 Mo. 527. (3) (a) The fact that John O'Day received said property as guardian of Mary Earles Kee, she having been fraudulently adjudged to be an heir of Charles E. Bunel, did not justify said O'Day in robbing the estate of his said ward, by converting it to his own use, and when said fraudulent adjudication was admitted by his ward, and decreed to be fraudulent by the United States Circuit Court, the equitable title to all the property and its income and profits in the hands of John O'Day as such guardian, was held by him for the benefit of Henry Napoleon Bunel, and he was bound to account to Bunel for any property belonging to said funds converted by him to his own use. Patterson v. Booth, 103 Mo. 402; Gamble v. Gibson, 59 Mo. 585; Evangelical Synod of N. A. v. Schoenich, 43 Mo. 652; McGuire v. Nugent, 103 Mo. 161; Thorpe v. McPike, 62 Mo. 300; Norton v. Irwin, 43 Mo. 153; Bispham's Principles of Equity, p. 92; Perry on Trusts (2 Ed.), sec. 429; Hill on Trusts (3 Ed.), 160; Baldwin v. Dalton, 168 Mo. 20; Phillips v. Overfield, 100 Mo. 466; Monroe v. Collins, 95 Mo. 33. (b) The fraudulent conversions by O'Day being shown, the true owner can follow the fund into the property held by his heirs. Patterson v. Booth, 103 Mo. 402; Roach v. Coraffa, 85 Col. 436; Bremell v. Adams, 146 Mo. 70. (4) (a) The conveyance by Mary Earles Kee to Henry N. Bunel

of all her right, title and interest in and to all the money, property or effects due her from the estate of John O'Day, deceased, her former guardian and curator, being money and property that the said John O'Day had received as her guardian and curator, and all the interests and profits arising therefrom to said Henry Napoleon Bunel, giving the said Henry Napoleon Bunel the same right to sue for the same that she had, and also all the money, notes, bonds and evidence of the debt due and held in trust for her by the New York Life Insurance and Trust Company of New York City in the State of New York, was not a mere assignment of the naked right to sue for fraud, but was based on valuable considerations. (b) The settlement was of disputed and litigated claims between them which is always a good consideration. (c) The deed was a restoration to the rightful owner, as far as in her power lay, of the property in O'Day's hands which had been fraudulently adjudged to Mary Earles by the New York court as the result of a fraudulent conspiracy. This is of itself a good consideration and cannot be held to be the assignment of a mere naked right to sue for fraudulent conversion. *Smith v. Wade*, 43 Mo. 557; *Jones v. Babcock*, 15 Mo. App. 149; *Lionberger v. Baker*, 14 Mo. App. 353; *Page v. Gardner*, 20 Mo. 507; *Johnson Co. v. Bryson*, 27 Mo. App. 341; *Conn. Mut. Life Co. v. Smith*, 117 Mo. 261; *Goodger v. Finn*, 10 Mo. App. 226; *Dickson v. Merchants Elevator Co.*, 44 Mo. App. 498; *Smith v. Harris*, 43 Mo. 557; *Wilson v. Railroad*, 120 Mo. 45; *O'Day v. Meadows & O'Day*, 194 Mo. 617. (5) Where a trustee mixes trust money with his own so that it cannot be distinguished what particular part is trust money and what part is private money, equity will follow the trust money by taking out what is due the *cestui que trust*. *Harrison v. Smith*, 83 Mo. 210; *Staller v. Coats*, 88 Mo. 514;

Evangelical Syn. of N. A. v. Schoeneich, 143 Mo. 652; Pundman v. Schoeneich, 144 Mo. 149; Tierman's Ex. v. Security B. & L. Assn., 152 Mo. 135; Flint Roar Cart Co. v. Stephens, 32 Mo. App. 341; Bircher v. Walther, 163 Mo. 461; Leonard v. Latimer, 67 Mo. App. 138; Bircher v. Sheet Metal Co., 77 Mo. 509; Bank v. Brightwood, 148 Mo. 367; Snoregrass v. Moore, 30 Mo. App. 232; Clark v. Bank, 57 Mo. App. 281; Bank v. Sanford, 62 Mo. App. 394; Brick Co. v. Schoeneich, 65 Mo. App. 283; Leonard v. Latimer, 67 Mo. App. 138; Peck v. Elliott, 30 Kan. 156; Thompson v. Bank, 8 Atl. 97; Plow Co. v. Lamp, 45 N. W. 104; Phelps v. Overfield, 100 Mo. 466; Meystedt v. Grace, 86 Mo. App. 178; 144 Mo. 149; 143 Mo. 664; 83 Mo. 210. (6) Any omission or concealment that wrongs the estate must be considered fraudulent without any reference to the motive that dictates it. Clyce v. Anderson, Ex'r, 49 Mo. 37; Smiley v. Smiley, 80 Mo. 44; Byerly v. Donlin, 73 Mo. 270; West v. Revis, 13 Ind. 294; Hook v. Payne, 14 Wall. (U. S.) 252. (7) The trust will attach to the property which is the product and substitute for the original thing, as it can be traced. Phillips v. Overfield, 100 Mo. 466; Patterson v. Booth, 103 Mo. 402; Parker v. Straat, 39 Mo. App. 616; Butler v. Lawson, 72 Mo. 227; Brief, 117 Mo. 284; Oliver v. Piatt, 3 How. (U. S.) 333; Bispham's Equity Jurisprudence (4 Ed.), sec. 86; 1 Perry on Trusts (2 Ed.), pp. 515, 518; 2 Pomeroy on Equity Jurisprudence (1 Ed.), p. 626.

Delaney & Delaney with *E. W. Banister* for respondents.

(1) The bill does not state facts sufficient to entitle complainants to the equitable relief prayed for or to any equitable relief whatever. (2) It will be seen from the allegations of the bill that complainants seek to recover on the theory that John O'Day used the money of his ward, Mary, in paying for the land and

that he purchased the property in fact for her, but took the title in his own name. To establish a trust on the theory that the money actually used in buying the property in question was trust money, the evidence, to warrant a decree, must be so clear, definite and positive as to leave no reasonable ground for doubt. *Johnson v. Quarles*, 46 Mo. 423; *Forrester v. Scoville*, 51 Mo. 268; *Jackson v. Wood*, 88 Mo. 76; *Philpot v. Penn*, 91 Mo. 38; *Rodgers v. Rodgers*, 87 Mo. 257; *Shaw v. Shaw*, 86 Mo. 594; *Kennedy v. Kennedy*, 57 Mo. 73; *Philips v. Overfield*, 100 Mo. 466; *Adams v. Burns*, 96 Mo. 361; *Burdett v. May*, 100 Mo. 13; *King v. Isley*, 116 Mo. 155; *Dailey v. Dailey*, 125 Mo. 96; *Buck v. Ashbrook*, 59 Mo. 200; *Ferris v. Van Vechten*, 73 N. Y. 13; *Oliver v. Platt*, 3 How. 333; *Story's Eq. Jur.*, secs. 1258; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Dodge v. Manning*, 1 N. Y. 298. "The principle to be deduced" is "that where the trust fund has consisted of money and been mingled with other moneys of the trustee in one mass, undivided and undistinguishable, and the trustee has made investments generally from moneys in his possession, the *cestui que trust* cannot claim a specific lien upon the property or funds constituting the investments." *Hill on Trustees*, 522; *Moses v. Margatroget*, 1 Johns. Ch. 119; *Kip v. Bank*, 10 Johns. 63; 2 Kent's Com., 623, 624; *Trevothick v. Austin*, 4 Mason 29; *Falkland v. Nat. Bk.*, 84 N. Y. 145; 2 Pom., Eq. Jur., 623n; *Atty.-Gen. v. Ins. Co.*, 82 N. Y. 193; *Cavin v. Gleason*, 105 N. Y. 263; *Ward v. Higgins*, 9 N. Y. 645. (3) When plaintiffs are contending that a resulting trust arose because O'Day used the purchase money of his ward in payment of the real estate purchased, surely this court will not declare a constructive trust and render judgment that O'Day had no right at all to buy. *Capen v. Garrison*, 193 Mo. 335; *Woods v. Boots*, 60 Mo. 546; *Wendleton v. O'Brien*, 68 Mo. App. 675. (4) The right of a *cestui que trust* to set aside a sale for fraud

practiced by the trustee, or to have one declared a trustee who purchases property with trust funds, is not assignable. There is nothing in plaintiff's bill or in the evidence in this case which exempts the transaction between Mary and Henry from the operation of this well-established rule. *Jones v. Babcock*, 15 Mo. App. 149; *McMahon v. Allen*, 34 Barb. 56; *Smith v. Harris*, 43 Mo. 557; *French v. Shotwell*, 5 Johns. Ch. 555; *Upton v. Bassett*, Cro. Eliz. 445; *Story's Eq.*, sec. 1040; *Morrison v. Deaderick*, 10 Humph. 342; *Whitney v. Kelly*, 94 Cal. (29 Pac. 624); *Sanborn v. Doe*, 92 Cal. (28 Pac. 105); *Dickerson v. Seoun*, 44 Mich. 631; *Milwaukee v. Railroad*, 20 Wis. 163; *Carrol v. Potter*, Walk. Ch. 355; *Wilson v. Railroad*, 120 Mo. 45; *Haseltine v. Smith*, 154 Mo. 404; *Hayward v. Smith*, 187 Mo. 464; *French v. Shotwell*, 20 Johns. Ch. 668; *Shufelt v. Shufelt*, 9 Paige Ch. 144; *Graham v. Railroad*, 102 U. S. 148; *Dayton v. Fargo*, 45 Mich. 153; 3 Pom. Eq. Jur., 386; *Crocker v. Bellangee*, 6 Wis. 645. (5) Even if Henry Bunel, on the evidence, had a prior original right to the funds and property, and even if the assignment was taken to remove an obstacle to the assertion of such right, and even if the bill declares on the original right, still the bill must be dismissed because the alleged assignment passes nothing. It does not describe the property involved in this suit nor does it attempt to describe it. It does not refer to O'Day or to his acts in connection with this property. There are no operative words sufficient to pass any interest in realty. The language used is too vague and general to pass a right to sue for fraud in a particular transaction. The word property is used in the restrictive sense of money, bonds, etc. *McKinney v. Settles*, 31 Mo. 541; *Smith v. Hutchinson*, 61 Mo. 87; *Webb v. Mullins*, 78 Ala. 111; *People v. Railroad*, 84 N. Y. 565; *Chicago v. Hulburt*, 118 Ill. 633; *Bridges v. Taylor*, 102

N. C. 86; Bancroft v. Curtis, 108 Mass. 50; Brailey v. Southborough, 6 Cush. 140.

LAMM, J.—Plaintiffs filed a bill in equity in the Greene Circuit Court to fasten a trust in their favor on certain real estate in the city of Springfield, Missouri (occupied by defendant, Nester, as tenant), devised by the will of John O'Day, Sr., to certain other defendants, viz: Sue I. Baldwin O'Day, his widow, and his minor children, Catherine, John Baldwin and Thomas K. O'Day, alleging that the other defendants claim some interest—the real estate to be impressed with the trust being described as follows: “A part of lot ten, block two, original plat of Springfield, Missouri, commencing at the southeast corner of said lot ten, thence north on west side of Boonville street twenty-two feet, west $117\frac{1}{2}$ feet, thence south twenty-two feet to north line of Olive street, east along north line of said Olive street to Boonville street, the place of beginning. Known as the ‘Mint Saloon Building.’ ”

At hearing, *nisi*, plaintiffs' evidence being in, defendants demurred. Their demurrer was sustained and plaintiffs appeal.

A student of the law (Mr. Moore) in Law Notes for March, 1907, p. 225, has written with felicity and judgment on Improbabilities — his data gathered by picking and choosing from the *dicta* of judges. He points out that CADWALADER, J., in Snyder v. Ins. Co., 22 Fed. Cas. 741, says: “The most improbable things are sometimes true, and the most probable things sometimes don't happen;” and that SAVAGE, J., in Shepard v. Railroad (Me.), 65 Atl. 20, says: “It is true, in human experience, that almost all things are possible.” It is Byron (was it not?) who philosophizes thus: “Truth is always strange, stranger than fiction,” which is but a paraphrase on the chimney-corner adage that — Truth is stranger than fiction. The French have a saw running in this wise: It is always the impossible

that happens, shaded off in everyday use by variation into: The unexpected always happens.

The miserable story of this case may bear such foreword, inasmuch as its dark incidents lie well within the borders of an evil wonderland. While the homespun names of some of the actors have a tang of cabin and native soil, other names carry the memory of the scholar back to the guillotine, the Reign of Terror, and to the spell of the traditions of the First Napoleon—the threads of that story stretching from France to the pine woods of northern Arkansas. The case is this:

Damas Napoleon Bunel, once (as we infer) a resident of the United States, died in France a citizen of that Republic on December 31, 1887, intestate, leaving one child and the descendants of another and an immense estate, partly in France and partly in the hands of the New York Life Insurance and Trust Company, as trustee, in the city of New York. It seems that fourteen years prior to his death, and again in 1876, he executed to said trust company certain instruments placing in its hands a large amount of property in trust (said to be of a value of \$500,000). The trustee had power to collect and receive the income and dividends of the trust estate, and, during the life of Damas Napoleon Bunel, apply the same to his use. On his dying, the trust estate was to be divided into two equal parts and administered as follows: One part to be kept invested and the income and profits thereof paid over to the daughter of Damas Napoleon Bunel, Marie Antoinette Alker. She, dying, her moiety was to be turned over to her children "*per stirpes*, share and share alike." The other moiety was to be kept invested and the income and profits thereof applied to the use of the son of Damas Napoleon Bunel, to-wit, Charles Emile Bunel. Upon the death of Charles Emile, said trustee was to pay over and transfer this moiety to the child or children of him, the said

Charles Emile, "*per stirpes*, share and share alike."

Marie Antoinette Alker and her husband Napoleon A. Alker resided in France. What ill wind blew Charles Emile Bunel far from home and kindred into the hill country of northern Arkansas, we know not; but in 1872 he was there, apparently living in penury and want, and there married one Nancy J. Petty on the 20th day of June of that year — the record showing that thereafter "the said Charles Emile Bunel and his wife Nancy lived in obscurity and indigence in different places in Arkansas and Missouri." In 1878 a son was born to Charles Emile Bunel and Nancy, his wife — the child being named Henry Napoleon Bunel, and he is one of the plaintiffs in this case. To poverty and obscurity was soon added the pinching shoe of marital infelicity and Nancy tired of and left the bed and board of Charles Emile. Later this couple drifted into Ozark county, Missouri, and there on April 28, 1884, Charles Emile brought suit against his spouse for divorce, alleging the following grounds: "That for more than six years last past, defendant has willfully and without just cause abandoned the bed of plaintiff, and refused to cohabit with plaintiff, as his wife; that defendant unmindful of the duties of a faithful wife, and the affection of plaintiff for her, on or about the — day of January, 1884, committed adultery with a man to plaintiff unknown. That the defendant is now pregnant by said person. That plaintiff has not had knowledge of defendant's person for about six years; that defendant has at divers times and places committed adultery with other men whose names and which times and places of said acts of adultery are unknown to plaintiff." On personal service, on the 9th day of June, 1884, Nancy appeared and answered, admitting her marriage but averring herself chaste. At a trial on the same day, the court heard the proofs, found the allegations of the petition true and granted a divorce

to Charles Emile Bunel. Four months thereafter a child was born to Nancy, a girl, who was named Mary and who figures in this record as "Mollie Earles," "Mary Earles," "Marie Bunel," "Mary Earles Kee," "Mary Bunel Earles Kee," and as "Mary Earles McKee." It seems that one Alfred Earles resided with Charles Emile and Nancy Bunel before their separation, and continued to live at Nancy's habitation thereafter; and in 1887 this twain were married. From data before us it would seem that, in spite of the untoward facts just laid bare, at least from January 1, 1888, to January 1, 1894, Nancy Earles was a pensioner on the Bunel estate in France to the amount of \$500 per annum. Charles Emile Bunel died on the 28th day of December, 1886, and in one year thereafter Damas Napoleon Bunel died. It seems on the death of the latter that ancillary administration was taken out in the city of New York by Frederic R. Coudert, Charles Coudert and Paul Fuller on his estate there situate. That in the spring of 1887 Marie Antoinette Alker and two of her sons came to southern Missouri, found Henry Napoleon Bunel and took him, then a child of nine years, to France, where, barring subsequent visits to this country, he has ever since resided as a citizen. In the Republic of France, one Napoleon Alker, a son of Marie Antoinette, was appointed guardian and curator of Henry Napoleon Bunel, caring for and educated him until his majority; and, having had charge of that portion of his grandfather's estate belonging to him in France, turned over to him \$140,000 of his inheritance. Presently Napoleon Alker, by virtue of his French curatorship, applied to the New York Life Ins. & Trust Co. for the moiety of the estate held in trust for his ward's father, Charles Emile Bunel. Thereupon said trust company declined to pay over to such curator the whole of said moiety but, holding a trust estate to be paid over to the "child or *children*" of Charles Emile

Bunel, it demanded proof of Henry Napoleon Bunel's sole heirship. Thereupon a suit was instituted by the trustee in the Supreme Court of the city of New York, having for its object the determination of that matter. The defendants in that suit were the aforesaid ancillary administrators, Marie Antoinette Alker, Henry Napoleon Bunel and Mary Earles—the latter being impleaded as Mary Earles, but pleading as "Marie Bunel." As we understand it, due service was had in that case. Henry Napoleon Bunel was represented by a guardian *ad litem*; and we infer Mary Earles, or Marie Bunel, was also so represented—the question at issue being the legitimacy of Mary. Was she the daughter of Charles Emile Bunel, and, therefore, entitled to inherit with Henry Napoleon? Or was she born out of wedlock, the child of Nancy Bunel and the said Henry Earles and therefore only the uterine sister of Henry Napoleon? Proofs were taken and, following them, a judgment entered in the Supreme Court of the city of New York finding the girl, Mary, a legitimate child, and the full sister of Henry Napoleon, and she was decreed co-heir with him in the estate of Charles Emile. Prior to the aforesaid judgment, one Horine was appointed by the probate court of Greene county, Missouri, guardian of the person and curator of the estate of the girl, at that time passing as Marie Bunel. Subsequently one Hansell became her guardian and curator; and we infer he was so acting when the judgment of the Supreme Court of the city of New York was rendered in December, 1893. Thereafter Hansell resigned, and one Frank P. Clements was appointed by the probate court of Greene county her guardian and curator. He in turn resigned, and John O'Day, Sr., took office as guardian and curator by due appointment, giving a bond as such in the sum of \$150,000, and receiving from said Clements the portion of his ward's estate then in Clement's hands—the part so received being

made up of payments to Clements from the New York trustee after the aforesaid judgment in the Supreme Court of the city of New York establishing the legitimacy and heirship of Marie Bunel, and amounting to cash, \$3,816.65, notes \$8,700. It seems that Mr. O'Day made a trip to Yoetot, France, and there ascertained that Napoleon Alker of that place had a large estate in his hands belonging to Marie, this on the theory she was co-heir with Henry Napoleon. Subsequently armed with an exemplification of the New York judgment and with an order of the probate court of Greene county directing him to at once proceed to Yoetot, France, and take the necessary steps to collect his ward's estate and empowering him to settle and compound the claims of his ward and to execute an acquittance and discharge therefor, etc., and further armed with a certificate that he was the guardian and curator of Marie Bunel, under a bond of \$150,000 for the faithful discharge of his duty, Mr. O'Day made a second trip to France and by proceedings in the French courts, gained possession of something like \$55,000 belonging to his ward — the same being her share of the estate of her putative grandfather, Damas Napoleon Bunel, in France, and in process of administration there — and brought said sum within the jurisdiction of the probate court of Greene county. Thereafter Mr. O'Day received further sums from the New York trustee, as dividends due Marie Bunel. He made six settlements with the probate court; the first in February, 1896; the second in February, 1897; the third in March, 1898; the fourth in February, 1899; the fifth in March, 1900; and on September 18, 1900, he resigned his trust, presumably having given notice required by Revised Statutes 1899, sec. 3529, and made his final settlement and was discharged — he and the defendant John O'Day, Jr., having been appointed joint curators and receipting to

John O'Day, Sr., for the estate left in his hands. The facts charged in plaintiffs' bill and upon which relief is sought are connected with the curatorship of John O'Day, Sr., prior to his said resignation and final settlement; therefore, these settlements will receive more particular attention further on.

It may be said that John O'Day, Sr., died testate on the 31st day of July, 1901; and that the scene now shifts to the United States Circuit Court for the Southern Division of the Western District of Missouri, sitting at Springfield. In that court, prior to the death of John O'Day, Sr., to-wit, in 1901, Henry Napoleon Bunel, as a citizen of France, lodged a bill in equity against John O'Day, Jr., and John O'Day, Sr., as curators of the estate of Mary Earles Kee, and Mary Earles Kee and Henry Kee, her husband, for the purpose of vesting the apparent title of Mary Earles Kee in and to the trust estate in the hands of said curators out of her and into Henry Napoleon Bunel. John O'Day, Sr., was not served in that case. Subsequently, and after the death of John O'Day, Sr., an amended bill was filed against John O'Day, Jr., as sole curator, and Mary Earles Kee and her husband. It seems that Marie Bunel (or Mary Earles) had married a man named Henry Kee (or McKee), and by said amended bill the facts hereinbefore set down were pleaded; and it was further alleged that Mary Earles Kee was not the child of Charles Emile Bunel, but of said Alfred Earles, *i. e.*, was no grandchild of Damas Napoleon Bunel; that when the father and grandfather of Henry Napoleon Bunel died, and he, a lad, was taken to France, it became noised abroad in Ozark county that, as the son of Charles Emile Bunel, he was heir to a great estate in France and New York City; that (using metaphor by way of illumination) as certain *carnivora* scent their prey up the wind, the possibilities of the case invited a simulated claim, even as where the car-

cass is, there the eagles are gathered together. Accordingly, one R., a deputy United States marshal, conceived the notion of making money by the bold stroke of claiming that Mary Earles was also an heir to the Bunel estate and entitled to one-fourth thereof. To that end R. employed K., an attorney at law, to bring suit to establish by a decree of court that Charles Emile Bunel was the father of Mary Earles; that Nancy and Henry Earles being poor, K. agreed to pay all costs and procure the evidence to establish Mary's legitimacy, and Nancy Earles agreed to give him one-half of the sum recovered (See *Kersey v. O'Day*, 173 Mo. 560); that K. and R. thereupon entered into a compact between themselves to procure the necessary evidence and establish such fact, at the time well knowing Mary was a bastard child. To that end the bill alleges they procured perjured testimony tending to show that Charles Emile Bunel was about his wife and had access to her in the months of January, February and March, 1884; that as a device furthering their scheme they caused the little girl, Mary (a Protestant child) to be baptized into the Roman Catholic church by a priest under the name of Marie Bunel, by representing to said priest she was the child of Charles Emile Bunel, a Roman Catholic; that they fraudulently procured from the probate court of Greene county the appointment of Horine as guardian and curator of Marie Bunel; that when issue was joined in the New York suit, the Supreme Court of that State appointed a commissioner, one W., to take testimony; that said court appointed one L. B. to act as guardian *ad litem* of Henry Napoleon Bunel, then about fourteen years old, and said guardian *ad litem* sent a young attorney, R., to Missouri to attend the taking of testimony, who betrayed the trust reposed in him and conspired with K., becoming K.'s servant and tool in procuring suborned witnesses as aforesaid; that the evidence so procured

was perjured; that the pleadings in the Supreme Court of New York, alleging that Mary Earles was a child of Charles Emile Bunel, were false; that said conspirators suppressed competent and known proofs establishing the illegitimacy of Mary; that witnesses at hand who knew the facts and informed said conspirators of their knowledge were not called to testify; that others were persuaded to leave the State, and that a reputable physician who knew that Charles Emile Bunel was impotent for more than eighteen months before the birth of Mary Earles and who was willing to depose to such material fact, was not called to depose; that because of such suppression of testimony and such bribed witnesses falsely swearing to facts having no existence, the Supreme Court of New York was induced to give an iniquitous decree in favor of Mary Earles in which it falsely appears that Charles Emile Bunel was her father; that all said evil things were done and said decree procured in order that said conspirators K. and R. might share the gains ill-gotten from such venture, and that they did receive \$30,000 of the plunder, all of which was paid out of Henry Napoleon Bunel's estate. It was further alleged that Henry Napoleon was not represented in said suit by any attorney who wanted he should win his case; and that as soon as he learned the frauds perpetrated on him, by a cablegram he instructed the plaintiff, Heffernan, to bring suit to recover the property wrongfully taken from him by said New York judgment. The bill further alleges that John O'Day, Jr., is the sole curator of the minor defendant Mary; that said curator had on hands \$25,000 in money and notes; that other large amounts of such trust fund were invested in real estate; that she and said John O'Day, Jr., are in possession of said real estate. Many tracts of land are then set forth and described as affected by said trust, but the tract in suit is not one of them. The prayer

of the bill was that the chancellor should determine that the money, notes and real estate aforesaid are the property of Henry Napoleon Bunel; that John O'Day, Jr., as curator, should be decreed to turn the same over to plaintiff; and that a writ of restitution issue for the possession of said real estate, and for general relief.

To the foregoing bill of complaint Alfred Earles made oath that he had heard the complaint read and knew that Mary, the wife of Henry Kee, is not a child of Charles Emile Bunel, but is the child of affiant. To the same effect was the affidavit of Nancy J. Earles. She deposed that she was the mother of plaintiff, Henry Napoleon Bunel, and the mother of Mary Earles Kee, the defendant; that the allegation that Alfred Earles is the father of Mary is true; that witnesses whose testimony was material to establish the fact that Henry Napoleon was the only child begotten of her marriage with Charles Emile Bunel were paid or in some way induced not to give their testimony to that effect, while other witnesses were induced to falsely swear to a set of given matters falsely showing that Charles Emile Bunel was the father of Mary.

On October 16, 1902, Mary Kee, signing herself, Mary Bunel Earles Kee, made answer to said bill of complaint. By that answer she admitted she was the child of Nanty and Alfred Earles, who were lawfully married after her birth. She remembers that as a child she was called "Mollie Earles," and avers that she always knew that Alfred Earles was her father. She admitted in detail the allegations of the complaint charging the wicked practices set forth therein leading up to the concoction of a fraudulent judgment establishing her legitimacy, though she qualified this by saying that she was but nine years old at the time and had no knowledge of the wrong being done her half-brother. She says: "On yesterday I attained my ma-

jority, eighteen years old, which under the laws of this, my native State, entitled me to act for myself. And being now of lawful age, I take this, my earliest opportunity, to restore to the plaintiff, my dear and affectionate half-brother, his property, and in every way in my power to right the wrongs done him by the designing conspirators who imposed upon the said Supreme Court of the city and county of New York, the false, fraudulent and perjured testimony tending to show that I was the daughter of Charles Emile Bunel and Nancy Petty, impleaded in some places as Nancy J. Petty." Following this, by name, date and detail, she admits, *seriatim*, each and every of the charges in the petition, including her mother's shame; admits that John O'Day, her former curator, purchased with trust funds in his hands as her curator the specific parcels of real estate described in the bill of complaint; admits that the plaintiff Henry Napoleon Bunel is the only heir born of the marriage of Charles Emile Bunel and Nancy Petty; and the final paragraph of her answer is as follows: "Now, that I have attained my age of eighteen years, I am willing to right the wrongs done plaintiff as aforesaid, this court entering a decree based upon the aforesaid facts, stated in the plaintiff's bill of complaint, and admitted by me to be true; and I consent that a decree *pro forma* be entered, giving to the plaintiff the title to all the above-described real estate and all the money, bonds, notes, and all other personal property now in possession of John O'Day, Jr., my curator." This answer was verified by the affidavit of Mary.

It was asserted *ore tenus* by counsel, and may be seen by inference in the case, that the foregoing concessions by way of admission were a part of a compromise of the litigation in the Federal court, in which at least a \$10,000 deposit (to become Mary's) figured. It seems that subsequently Mary Earles Kee made ap-

plication to withdraw her said answer, and asked leave to file further answer and cross-bill, which pleading was tendered with the application. This application was denied, and it is asserted that evidence was taken upon which that denial was predicated. Whereupon, a decree was entered, in effect, *pro confesso* that the personal property of whatever kind and description in the possession or control of John O'Day, Jr., curator of the estate of Mary Earles Kee at the time of the institution of this suit, and since coming into his possession and under his control, was and is held in trust for the use and benefit of Henry Napoleon Bunel, and said Henry Napoleon is entitled to have an accounting with said curator; and, further, that the right, title and interest in and to said personal property is divested out of her and vested into Henry Napoleon; and that all the right, title and interest of the defendant Mary in and to the fund described in the bill of complaint held in trust for her by the New York Life Insurance and Trust Co., in law and equity belonged to Henry Napoleon, and the same is divested out of the said Mary and into him. John O'Day, Jr., was perpetually enjoined from paying over any of said funds in his hands to Mary, and it is set forth that the real estate described in the bill has been adjusted by mutual conveyances and is not affected by the decree—costs were adjudged against Mary, and the cause continued for further proceedings in the matter of the accounting between Henry Napoleon and John O'Day, Jr.

It is asserted that the foregoing decree was appealed from by Mary Earles Kee and by John O'Day, Jr., and a settlement made pending such appeal, but such facts do not appear in this record.

On the same day of Mary's answer to the amended bill in the Federal court, and of her making affidavit to the same, to-wit, October 16, 1902, she executed a quitclaim deed to Henry Napoleon Bunel in consider-

ation of one dollar. By this deed she conveyed sundry tracts of land in Greene county to Henry Napoleon by specific description; but the tract in suit is not one of those described. If that tract was conveyed, or in any wise affected by that deed, as a deed, it was under the following clause of the conveyance:

"I hereby assign, transfer all my rights, title, interest and estate in and to all the money, property, or effects due me from the estate of John D'Day deceased, my former guardian and curator; being money and property that the said John O'Day, now deceased, received as my guardian and curator, or as my curator, and all the interest and profits arising therefrom, to the said Henry Napoleon Bunel, giving the said Henry Napoleon Bunel the same right to sue for the same that I have. Also all the money, notes, bonds and evidence of the debt due and held in trust for me by the New York Life Insurance and Trust Company of New York City, in the State of New York."

Following Mary's deed to Henry (and on the same day) he executed a warranty deed for an expressed consideration of one dollar to the plaintiff, F. S. Heffernan, his attorney in the litigation in the Federal court, specifically conveying the property in dispute, with other property, and further assigning and transferring to Mr. Heffernan all his right, title and interest in and to all the money or property "due from the estate of John O'Day, deceased," the former guardian and curator of Mary Bunel Earles, giving said Heffernan the same right the grantor had to sue for said property or trust fund in any court of law or equity.

Some time thereafter, at a date not fixed by the record, Mr. Heffernan made an examination of the record and it was shown by his oral testimony, over the objection of defendants, that he had made a reconveyance to Henry Napoleon of a half interest in the prop-

erty conveyed and rights transferred to him. His explanation of this reconveyance was as follows: "After making an examination of the records of the probate court, I ascertained that the liabilities due from the estate of John O'Day, deceased, would be much larger than I had first supposed, and I reassigned to Henry N. Bunel one-half of the property he had conveyed to me." Mr. Heffernan was allowed to testify that he sent this conveyance to Henry Napoleon Bunel at Gates Station in Greene county, where he was living with his mother; that shortly thereafter, "his stepfather told me he received it." The witness further testified that presently Bunel came into his office and admitted receiving it, and that he swore he received it in the Federal court; that Bunel was in Paris the last the witness heard of him.

The trial of the case at bar was in November, 1903, and Mr. Heffernan testified that Henry Napoleon left the State of Missouri in "February last," with the understanding that he would be back before the first day of April. There was no record of the conveyance from Heffernan to Henry Napoleon; and on the above state of proof, over the objection of defendants and exception saved, Mr. Heffernan was permitted to give secondary evidence of the contents of this unrecorded deed, presumably in the possession of his co-plaintiff.

Based on the theory that plaintiffs were entitled to an undivided half each in the property in suit, plaintiffs (as said) lodged a bill in equity in the circuit court of Greene county against the defendants. This bill was subsequently amended, and as amended, in substance, pleads that John O'Day was the guardian and curator of the estate of Mary Earles, alias Mary Bunel; that there came into his hands as such guardian and curator \$90,000 of money belonging to Mary, then a minor; that on the 7th day of September, 1896, said guardian and curator loaned \$10,000 of such funds to Pattie D.

McElhaney and took the note of said McElhaney therefor in his name as guardian and curator, and at the same time, to secure said loan, took from Pattie D. and her husband a deed of trust on the Mint Saloon building, being the property heretofore described; that on the 2nd day of February, 1898, said deed of trust was foreclosed and the property sold at public vendue and bid in by said O'Day for his ward, but that O'Day took the title through a trustee's deed in his own name; that the money used for the said purchase of said property was Mary's, and that O'Day held the legal title thereto up to the time of his death; that when he died in July, 1901, leaving a will, he devised said property to his widow and certain of the defendants, and the legal title now rests in said devisees—defendant Nester being a tenant under them; that the monthly rental of said property was \$100, which defendants had collected since August, 1901. The bill proceeds to set forth that Henry Napoleon Bunel brought a suit in equity in the United States Circuit court at Springfield wherein he contended that Mary Earles was only his uterine sister; that in said suit Mary contended she was his full sister; that Henry contended that all the property and trust fund in the possession of O'Day as guardian and curator of Mary were his property as only heir at law of Charles Emile Bunel, deceased; that the object of said suit in the United States Circuit Court was to have the property in the possession and control of the guardian and curator of Mary decreed to be his property; that the Mint Saloon was a part of the property to be affected; that during the pendency of that suit Mary reached her majority, and, by way of a settlement, admitted by answer she was only the uterine sister of Henry, and that, in consideration of a compromise, Mary conveyed and assigned all the trust property to Henry, including the property sued for, and Henry conveyed said property back to Mary for her

use and benefit during her natural life. Mary's deed of October 16, 1902, to Henry is pleaded; and it is averred that by said deed she assigned and transferred and duly conveyed said property (the Mint Saloon) and all rights and rents due therefrom to Henry, and Henry on the same day made a like conveyance and assignment to his co-plaintiff, Heffernan; and Heffernan, in November, 1902, assigned and transferred an undivided half interest in the Mint Saloon back to his co-plaintiff, Henry; and that the two are now, in equity and good conscience, entitled to said property. Wherefore, they pray an accounting of the rents, that the title of said real estate be vested out of defendants and into plaintiffs, that a writ of restitution issue, and for costs and for such other orders, judgments, and decrees as a court of equity may find right and just.

To this amended bill, defendants demurred, generally and specially, and, their demurrer being overruled, they answered, admitting that John O'Day was the guardian and curator of Mary and that defendants are the devisees of said O'Day, but they deny all other allegations, and specifically deny that the Mint Saloon was purchased with the money of Mary Earles. Defendants then, by way of further defense, allege that the conveyance of Mary Earles to plaintiffs was procured by fraud and misrepresentation; that the suit in the Federal court, referred to by plaintiff, is still pending in the Supreme Court of the United States; and that Mary Earles is now claiming that said alleged settlement was procured by fraud. Defendants say that Mary Earles should be made a party hereto.

The last paragraph of the answer, charging fraud in the assignment and settlement, and the pendency of the suit in the Supreme Court of the United States, was struck out on motion, leaving the answer stand on the general issue modified by the specific admissions aforesaid.

To sustain the allegations of the bill, the settlements of John O'Day, Sr., as curator of Mary were put in evidence. It seems Mr. O'Day was a man of large means and died leaving a very large estate. It does not appear that he kept a bank account as a curator; and the case is presented to us on the theory the ward's funds were commingled with his own. It does appear that he loaned a great deal of his ward's money; and notes, deeds of trust, sales thereunder, and conveyances pertaining to the same, disconnected from the matter in hand, were introduced in evidence, on the theory of plaintiff's learned counsel that they tended to show a misuse of funds in those specific instances—thereby showing (they argue) that his system of dealing with the trust estate indicated a disposition to speculate off of the beneficiary. But these transactions are not developed sufficiently to show a general plan of exploiting the trust and being wholly disconnected from the subject-matter of the suit, we consider them of no value and they are put to one side. The curatorship seems to have been a stormy one, full of incidents and litigation; and divers attorneys were employed from time to time by Mr. O'Day to protect his ward's interests, and heavy expense was entailed. One of these attorneys, it was said *ore tenus*, and as indicated by the final settlement, was Mr. Heffernan, one of the plaintiffs in this case. It was said, and not denied, that he prepared the final settlement of Mr. O'Day as curator. It seems that in the annual settlements errors of bookkeeping crept in, subsequently discovered and corrected; also that in some of these settlements Mr. O'Day distinguished between cash on hand and money loaned out and took a credit for such loans in his accounts. In other settlements he treated the loans made by him as curator as cash on hand and charged himself in gross. In some instances loans were foreclosed and the property bought in the name

of his ward. In such instances the facts appear in the settlements and a credit is taken by the curator for the amount of money invested in real estate by purchase in the ward's name and foreclosure. In the view we take of this case, it will not be necessary to set forth these settlements, because there is no attempt made here to impeach the final settlement, and set aside the order approving the same. As said, the case was argued to us on the theory one of the plaintiffs, Mr. Heffernan, made that settlement; and therein the plan was adopted of going back over the history of the curatorship and charging Mr. O'Day with the money coming into his hands as curator, and taking a credit for summarized disbursements shown by the annual settlements and approved by the probate court. That settlement is as follows:

In the Probate Court of Greene County, Missouri.

John O'Day, guardian and curator of the estate of Mary Bunel, submits the following account current for final settlement in said estate:

First settlement to inventory		
from former curator	\$14,508 83	
Interest collected on Dorsey		
note	20 93	
By cash disbursed		\$ 2,902 78
Second settlement, to cash		
from France	54,545 00	
To interest received ..	1,975 00	
By cash disbursed		7,700 75
Third settlement, to interest		
collected	3,796 15	
By cash disbursed		2,472 11
Fourth settlement to interest		
received	2,669 40	
By cash disbursed		4,054 03

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Fifth settlement, to interest	
collected	2,803 31
By cash disbursed	22,044 40

Final Settlement.

March, 1900. By cash allow-	
ance Nancy Earles	40 00
March 8. By cash, H. M.	
Heckart, for work	20 00
March 12. By cash, ward ..	5 00
March 12. By cash, court cost	13 75
March 14. By cash, Mat.	
Sims, abstract supreme	
court	675 60
March 20. By cash F. S. Hef-	
fernan, attorney, making	
settlement of case in su-	
preme court	\$ 2,000 00
April 1. By cash, Nancy	
Earles, allowance	40 00
April 4. By cash, Reps Dry	
Goods Co.	13 75
April 10. By cash, back tax .	128 35
April 10. By cash, back tax ..	71 95
April 10. By cash, back tax ..	62 74
April 10. By cash, back tax ..	37 05
April 10. By cash, back tax ..	35 15
April 16. By cash, Jas. Y. Mil-	
ner, rent	250 00
May 3. By cash, Nancy Earles,	
allowance	40 00
May 16. By cash, Mary Bunel	
Kee, ward	200 00
June 2. By cash, Towns &	
Dean, painting for ward ..	8 35
June 6. By cash, John O'Day,	
Jr., mdse. for ward	15 52

June 6. By cash, Nancy Earles, allowance	40 00
June 23. By cash, Mary Bunel	150 00
June 27. By cash, Mary Bunel	100 00
July 1. By cash, Nancy Earles, allowance	40 00
July 19. By cash, to John O'- Day, mdse. for ward	81 60
Aug. 1. By cash, Nancy Earles, allowance	40 00
Aug. 25. By cash, Davis Plan- ing Mill Co., for repairs	40 00
Aug. 27. By cash, Mary Bunel Kee, ward	25 00
Aug. 31. By cash, Perry Buch- anan, repairs	3 50
Sept. 1. By cash, Nancy Earles, allowance	40 00
Sept. 13. By cash, Mary Bu- nel Kee, ward	25 00
Sept. 15. By cash, attorney fee for this settlement	100 00
Sept. 15. By cash, court costs to date	10 65
Sept. 15. By cash, real estate taken under deeds of trust, etc.	15,932 00
To interest collected from New York \$	815 49
To interest from F. S. Heffer- nan	250 00
To rents collected	176 00
	<hr/>
	\$81,560 11

Bunel and Heffernan v. Nester.

Disbursements	\$59,458 85	
By allowance defending all suits against the estate and case of management for five and one-half years	1,500 00	
By spending money for ward . April 3, 1900. By cash, J. L. Stewart, in full account ..	5 00	42 40
By cash, Error, Mat. Sims ac- count	1 80	
By cash, notice of final settle- ment	2 50	
By cash, tax 1899	352 51	
By cash, A. C. Cowden, attor- ney for ward in examin- ing all settlements	200 00	
By cash, to ward this date	100 00	
By cash, O. H. Travers, attor- ney for	400 00	
By cash, Additional costs .. .	1 80	
	\$81,560 11	\$62,077 36
Balance due estate, bonds, notes and cash	\$19,482 75	

It is agreed on all sides that the item in the foregoing settlement, to wit, "By cash, real estate taken under deeds of trust, etc., \$15,932," did not include the Mint Saloon, but did cover real estate purchased in the name of his ward at foreclosure. Plaintiffs' equities, if any, arise out of a McElhaney loan, the facts pertaining to which will presently appear with particularity. It is further agreed on all hands that \$10,000 of the ward's estate were loaned to the McElhaney. It is contended by defendants' learned counsel that O'Day charged himself in the foregoing final settlement with the body of the McElhaney loan. Plaintiffs' learned counsel say *contra*. Their position is

that O'Day "never accounted to his ward for the conversion of this fund." We find the facts to be that the body of the McElhaney loan is charged to O'Day in the foregoing final settlement—appearing therein in the bulk charges made against himself of the original moneys coming into his hands as curator. Furthermore, as shown by one of his annual settlements, he collected certain interest on the McElhaney loan; and that interest is charged to him and appears in the final settlement under the head of, "To interest received." It was shown that the foregoing final settlement of John O'Day was examined, filed and approved on the 18th day of September, 1903, by the probate court of Greene county, and that on the day of the approval of that settlement John O'Day, Jr., and John O'Day, Sr., as curators of the estate of Mary Bunel Kee, receipted to John O'Day, Sr., for the balance due his ward as found by that final settlement, and John O'Day, Sr., as individual curator, stood discharged.

Attending to the McElhaney loan, it appears that on the 7th day of September, 1896, John O'Day, Sr., as curator of Mary Bunel, loaned Pattie D. McElhaney \$8,500 and took her notes to himself as the guardian and curator of Mary for said sum, due in three years, with interest payable semi-annually. At that very time Mrs. McElhaney was indebted to one Mills in the sum of \$765, evidenced by a note. As we understand it, it was necessary to protect the Mills note in order to perfect the title to the property, securing the loan; accordingly, the Mills paper was secured by the same deed of trust securing the loan. This deed of trust was to E. C. O'Day, trustee, was in ordinary form, with power of sale, and conveyed two pieces of property in Springfield — one, known as the First National Bank building, and lot, is the subject-matter of another suit; the other, known as the Mint Saloon, is the subject-matter of this suit. Subsequently, on the 27th day of

October, 1896, John O'Day, Sr., as curator for Mary, loaned to the McElhaney's, husband and wife, \$1,500 more of his ward's money. At that very time the McElhaney's were indebted to him individually in sums evidenced by notes said to aggregate \$5,000. Thereupon, to secure the new advance of \$1,500 from his ward's funds, and to secure his own individual indebtedness, the McElhaney's executed a deed of trust in ordinary form to E. C. O'Day, trustee, covering the same property, to-wit, the First National Bank building and the Mint Saloon. The note evidencing the new advance was taken in the name of O'Day as curator, and ran for two years, with eight per cent interest payable semi-annually.

Because of the default made "in the payment of taxes, insurance and interest," the deed of trust bearing the date of September 8, 1896, was foreclosed by advertisement by E. C. O'Day as trustee on the 8th day of February, 1898—eighteen months after its execution. At that sale John O'Day, Sr., purchased both the properties conveyed by the deed of trust at a gross sum of \$14,600, and received a trustee's deed therefor to himself individually, in which it is narrated that said sum was paid to the trustee by the purchaser. It will be seen that the deed of trust foreclosed secured \$8,500 of Mary's funds and also the Mills note; and it will be seen, further, that here was a surplus (over both the debts) created by this sale, subject to be applied on indebtedness secured by the second deed of trust and sufficient to wipe out the \$1,500 of the ward's money secured thereby, and leaving a further surplus to be applied on the individual indebtedness of John O'Day, also so secured.

By oral testimony from R. L. McElhaney, the husband of Pattie D., and a son, Homer L., who attended the sale, it was shown that the First National Bank building brought \$6,600 and the Mint Saloon \$8,000.

The elder McElhaney testified he was endeavoring to stop the sale; that John O'Day assured him the property would bring more than the deed of trust, and that he (O'Day) would bid it up; that it made no difference if it sold for \$100,000 he (O'Day) would pay the McElhaney the difference between what it was worth and what was borrowed on it. Witness said he did not remember all the conversation, but O'Day said he would buy the property for his ward—he was bidding on it for his ward. It was shown that O'Day had never paid over any surplus to the McElhaney; that they had tried to have a settlement with him, but that he was sick and pleaded for time. By the son, Homer L., it was shown that O'Day assured his father at the sale that he was buying the property in to protect his ward, Mary Bunel, and further assured his father he would protect Mrs. McElhaney in her interest; and that if the property did not bring what they thought was an equitable value for it, he (O'Day) would bid it in for his ward—that he was bidding it in for his ward.

It was shown that John O'Day was not a party to the decree in the Federal court. Alive when the suit was brought, he was not served, and when he died pending the suit, it was not revived against his heirs or representatives. There is not an allegation or a particle of proof connecting him in any way with the frauds leading up to the New York judgment; nor was he a party to that proceeding. There was no evidence tending to show that the Mint Saloon building and the First National Bank building were bought in by O'Day at a speculative value—*contra*, the indications are that full value was paid for both. There is no evidence there was any surplus at that sale over and above the McElhaney obligations, the Mills note and the secured individual indebtedness of John O'Day. The two McElhaney notes were put in evidence—one for \$8,500, the other for \$1,500; and indorsed across the face of

each was the following: "Paid by sale under deed of trust." Who put that indorsement on these notes was not shown, nor does the record show from whose custody these notes came. Mr. Mills was placed on the stand, and by him it was shown that the trustee paid him nothing, but that John O'Day, Sr., had permitted him to collect the rents on the Mint Saloon for a time to apply on his (Mills') debt; and that he had collected and applied the sum of \$592, leaving a balance unpaid. It was admitted at the trial that E. C. O'Day was dead, and the will of John O'Day, Sr., devising the Mint Saloon property to defendant Catherine and her children was introduced.

Such was plaintiffs' case; and on the foregoing record it is insisted there was either a resulting or a constructive trust arising from the facts in proof in favor of Mary Earles; that the devisees in John O'Day's will held subject to that trust and were seized of the property to the use of Mary Earles; that when the circuit court of the United States decreed the funds in the hands of O'Day to belong to Henry Napoleon, and when Mary admitted that to be so and executed her deed to Henry, the beneficial interest in the property passed to Henry and then passed to his co-plaintiff, Heffernan, under his deed, that an undivided half interest passed back to Henry by Heffernan's unrecorded deed, and that the chancellor erred in sustaining the demurrer to the evidence and dismissing the bill.

Did the chancellor err? We think not. Because:

Implied trusts, whether they be such as are designated in the books as resulting trusts or those called constructive trusts, were early taken out of the provisions of the Statute of Frauds and Perjuries, to-wit, the statute "For the Prevention of Frauds and Perjuries" (Vol. 1 Laws of Mo. 1825, p. 403). And such is now the written law. [R. S. 1899, sec. 3417.] That is,

the proof of the existence of such trusts rests in parol. "Resulting or presumptive trusts," says Bouvier (2 Bouv., Tit. Resulting Trusts), "being those which are implied or presumed from the supposed intention of the parties and the nature of the transaction; constructive trusts, such as are raised independently of any such intention, and which are forced on the conscience of the trustee by equitable construction and the operation of law." A familiar example of a resulting trust is where A purchases real estate with the money of B (A and B being strangers) and takes the title in his own name. In such case a resulting trust arises in favor of B—the trust being "raised by the law from the presumed intention of the parties, and the natural equity that one who furnishes the means for the acquisition of the property should enjoy its benefit." Where a part only of the purchase money is furnished by the beneficiary, the trust is for a proportionate share of the land bought. [Stevenson v. Smith, 189 Mo. l. c. 466; *In re Ferguson's Estate*, 124 Mo. l. c. 582.]

An analysis of plaintiffs' amended bill shows it to be somewhat framed on the theory of a resulting trust, as distinguished from that class of implied trusts known as constructive trusts. The bill charges in so many words: "That the funds and the money used for the purchase of said property was the money of said Mary, held by the said O'Day, as such guardian and curator of said Mary." Plaintiffs' learned counsel argue there was a trust raised by the facts in proof, that technically it was either a resulting or constructive trust, it was immaterial which, and that under the averments of their bill they should recover on either theory. In the view we take of the matter it will not be necessary to let the case ride off on a mere refined application of the rules of pleading. Both plaintiffs and defendants are in equity, the facts are here, and the thing to do is to get at the equity of the case.

At the very threshold it must be evident that plaintiffs' equities, if any, must stand or fall on the proposition that the trust fund in the hands of John O'Day was used in the purchase of the Mint Saloon property. If it was so used, then it might be necessary to consider contentions made by defendants and denied by plaintiffs, to-wit, that, whatever the rights of Mary, those rights were not a vendible commodity—and hence were not transferred to Henry Napoleon Bunel; and that if they could be transferred to Henry, they could not be transferred by him to the plaintiff, Heffernan, or be kept alive or revived by the conveyance of Heffernan of a half interest back to Bunel.

Present the proof that O'Day accounted for the body of the McElhaney loan by charging himself in gross with the whole estate coming into his hands originally, as here, and absent the proof that there was any increment of gain by way of speculation in the purchase of the Mint Saloon property, as here, then we have nothing to do with collateral matters on other property transactions lugged into the case and claimed to show a uniform and general scheme of exploiting the trust estate. This controversy is between plaintiffs, on one side, and the widow and minor children of John O'Day who set up title to the Mint Saloon building under a devise in his will, on the other; and they may not be deprived of their estate by either innuendo or argument based on transactions of testator pertaining to other properties. If they lose their property, it must be solely because of some proved vice inherent in their title to the property, and because of some settled principle of equity causing them to be seized of the title to the use of plaintiffs. Courts watch the transactions of trustees in handling trust funds with vigilance and solicitude. They may not speculate off the funds held in a fiduciary capacity, nor otherwise employ them to their individual gain. But in this case we find no proof suffi-

cient to sustain plaintiffs' contentions. The situation O'Day was in was peculiar. He was obliged to use diligence to protect the trust fund. Now, the senior deed of trust of the McElhaney's secured a note to one Mills in addition to his ward. The junior deed of trust secured O'Day's debt, as well as the ward's. What principle of natural equity or written law denied to O'Day the privilege to bid at the foreclosure sale in his own right to protect himself as well as the ward and Mills? We know of none. This, under the facts in proof, is precisely what O'Day did. He bid more than the ward's debt. Could it be contended that he could change the character of the trust fund and bid in excess of the ward's debt and charge the ward with the purchase price? This might be so under extraordinary circumstances appealing to the chancellor as the exercise of a wise discretion; but no such circumstances are shown to exist. The thing O'Day did was to treat the purchase as his own and to account to the ward for the loan; and in such circumstances and under the existing proof, we cannot say he speculated off of his ward in this instance, or used his ward's money in the purchase. The narration in the trustee's deed that O'Day paid the purchase price to the trustee is presumptively true. The fact that the McElhaney notes were marked "paid by sale under deed of trust" does not indicate that the ward's money was used in the purchase. If that indorsement was put on by O'Day or by the trustee, unexplained, it tends to show that the money to pay these notes had been realized by the sale and the notes had been paid by the proceeds of the sale. This conclusion is fortified by the fact that in the final settlement he treats the McElhaney notes as if paid to him and as left in the corpus of the trust estate. The disconnected parts of poorly remembered conversations at the day of sale whereby O'Day is made to say that he is bidding for his ward, *etc.*, are not sufficient to

show that he took title for his ward — the rule being that where plaintiff relies for title on raising an implied trust, the proof should be so clear, so unequivocal, so cogent and impelling as to exclude every reasonable doubt from the chancellor's mind.

Giving force to that rule and attending to the fact that the trustee is dead and that Mr. O'Day is dead, that he was solvent and possessed of large means and handling large sums, that this transaction was never questioned in his life, that he treated the Mint Saloon property as his own and disposed of it specifically by will, that the transaction was not questioned in the proceedings in the Federal court and that the property in question is not specifically described in Mary's deed to Henry, while other parcels of real estate were so described, we think the demurrer was properly sustained.

In coming to this conclusion we have not overlooked the fact that the McElhaney foreclosure was based on a default in the payment of interest, as well as default in the payment of taxes and insurance. It is sufficient to say that if some of the interest accruing on the McElhaney loan was not accounted for by O'Day in his final settlement, or if he is to be charged with interest for not keeping the funds loaned out at a legal rate, no such questions are involved in the issues of this case, and, therefore, such questions are reserved as open and not precluded by this litigation. Under some circumstances interest should be charged to a trustee; under other circumstances, not; and neither the pleadings nor the proof here require us to go into that question — there being no offer here by plaintiffs to do equity, to repay to O'Day's estate the amount invested by John O'Day in the property, and no claim that accrued interest was used toward paying a part of the purchase price.

The judgment sustaining the demurrer and dismissing the bill is affirmed.

All concur, except *Woodson, J.*, not sitting.

WEIERMUELLER, Appellant, v. SCULLIN.

In Banc, April 29, 1907.

1. **WITNESS: Party to Contract: Other Party Dead.** The statute (sec. 4652, R. S. 1899) is an enabling, not a disqualifying, act. It does not disqualify any person to testify because of his interest in the contract, whether the other be dead or not. It disqualifies the surviving party only when one of the original parties to the contract is dead, and it does that because the other party is dead. But where one of them has died, his assignee of the claim sued on may testify as to what occurred in regard to the contract after his death, and the other party may contradict that testimony and may give his own explanation of such post-mortem occurrences. [Overruling *Curd v. Brown*, 148 Mo. 95.]
2. ———: ———: ———: **Subsequent Transactions.** The statute does not exclude the living party from testifying where his evidence relates to transactions and conversations had with others to which the deceased was not a party and with which he had no connection. Where the suit is based on conversations had by decedent's assignee with defendant and admissions and promises by him, after decedent's death, defendant, the surviving party, may deny such admissions and explain the transaction, even though the claim grows out of a supposed debt due decedent and assigned to plaintiff.
3. ———: ———: ———: **Where Administrator is Party.** Where the administrator is a party to the action, the surviving party is disqualified to testify for any purpose until after the will is probated or the administrator is appointed; and much of the confusion attending the statute is due to a failure to observe this arbitrary distinction which it makes.

Transferred from St. Louis Court of Appeals.

AFFIRMED.

John J. O'Connor for appellant.

According to the evidence on both sides, the account sued upon represents money received by defendant from Samuel Weiermueller in 1889, and which he promised to repay to Weiermueller. Before payment Weiermueller assigned the debt to his wife and died. Thereafter, defendant made payments on the assigned debt to her, and refused to pay more. This suit is against the said debtor for what she claims to be still due on said debt. Under such circumstances, Weiermueller being dead, it was error to permit defendant to testify to the amount of the indebtedness, or permit him to testify at all over plaintiff's objections, based upon the ground that Weiermueller, with whom the defendant had the transaction, was dead. He was incompetent to testify in the case for any purpose whatever. Sec. 4652, R. S. 1899; *Curd v. Brown*, 148 Mo. 91; *Wood v. Mathews*, 73 Mo. 477; *Leeper v. Taylor*, 111 Mo. 323; *Bagnell v. Bank*, 76 Mo. App. 124. Nor could he testify in contradiction of plaintiff's statements. *Curd v. Brown*, 148 Mo. 91.

Scullin & Chopin for respondent.

Respondent was properly permitted to testify, as a matter of denial, to the real statements made to appellant concerning the transactions with her husband, after appellant had testified as to the purport of such conversations. *Wade v. Hardy*, 75 Mo. 394; *Palmer v. Kellogg*, 11 Gray 27; *Cronan v. Cotting*, 99 Mass. 334; *Henry v. Buddecke*, 81 Mo. App. 360; *Kirton v. Bull*, 168 Mo. 622.

IN DIVISION ONE.

WOODSON, J.—This suit originated in the circuit court of the city of St. Louis, and is based upon an assigned account for the sum of \$250, with divers credits thereon aggregating the sum of \$162.75, and the balance alleged to be due with the interest to the date

of filing the suit amounted to the sum of \$246.06.

The answer was a general denial.

The trial was before a jury.

The evidence for the appellant tended to show that she was the widow of Samuel Weiermueller, deceased, and that he assigned the account sued on to her on the 10th day of November, 1892, and died in the following December.

Appellant testified that after the death of her husband she went to see respondent regarding the account, and demanded payment, and he said: "Very well, I will pay you as soon as I am able." That was in 1896 or 1897. "I went to see him again, and he said: 'I will try and give you some on that account my next pay day.' I think it was about the third time [I went] that he gave me some money on account, which was \$5," and that between May 6, 1897, and September 14, 1901, he paid her divers sums of money, aggregating \$162.75, and that she kept a memoranda of all the payments and the dates thereof, which she stated in detail. She also testified that he never denied that he owed her the \$250, and that she knew nothing about the loan of the money by her husband to respondent.

Over the objections of the appellant, the respondent testified as follows:

Q. What did she [the appellant] say to you when she came to you? A. The first time she came she said, "I understand that you have promised" — in the first place she said that "she was very hard up," and said "she did not have any money and that she understood her husband to say that I had promised to pay him back some money he had paid me for those teams," and I told her that was right; that I had done that. She asked me how much it was and I told her it was \$140, and I told her that I had promised him just before he died that I would do that, and that I would just as soon as I was able, and I did do it. I paid her from time to

time five dollars until I had it more than paid up — in fact I kept giving her money until she came to me with her husband, and then I told her that that settled it. I wouldn't pay her any more, that I had more than paid her what I had promised to pay her. I kept an account of the sums I paid her, which was about \$160.

He further testified that she never presented any account to him and that he had never promised to pay her any more than \$140, and that he had paid her over that amount because her husband was a particular friend of his and had been in his employ thirteen years, and he wanted to help his widow along, and that when she married again he stopped the payments.

Appellant objected to respondent testifying in the case, because the other party to the contract in issue and on trial was dead, which objection was by the court overruled, and appellant duly excepted.

That was all the evidence in the case, and thereupon the court instructed the jury upon two theories of the case, presented by the evidence, to which action of the court appellant objected and excepted.

The jury found the issue for the respondent. Whereupon appellant filed her motion for a new trial, which was overruled, and she duly prosecuted her appeal to the St. Louis Court of Appeals, where the judgment of the circuit court was affirmed by a divided court, and the dissenting judge certified the cause to this court because, in his judgment, the opinion of that court was in conflict with the decisions of this court, namely: *Kersey v. O'Day*, 173 Mo. 560, and *Curd v. Brown*, 148 Mo. 82.

There is but one question presented by this record and that is, was the respondent a competent witness to testify to the conversations and transactions mentioned in his evidence?

It will be seen from reading the evidence that there was no evidence whatever that respondent was indebt-

ed to her husband, except her testimony, which tended to show that he at least tacitly admitted he owed the debt, and respondent's own testimony to the effect that he told her that he had promised her husband to pay him back *some money* the deceased had paid him for teams.

There has been some conflict between the decisions of this court upon the question here presented and some confusion has resulted in consequence thereof, in the admission and rejection of evidence. But it seems that the confusion has largely grown out of the fact that the nature and purpose of the statute governing such evidence has not at *all times* been kept in view.

Section 4652, Revised Statutes 1899, provides that, "No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility: Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in the favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator."

This statute is an enabling and not a disabling act. [Bates v. Forcht, 89 Mo. 121.]

The common law rejected the testimony of all persons whose pecuniary interest was directly involved in the matter in issue and on trial. [1 Greenleaf, Evid. (16 Ed.), secs. 327 and 328b.]

The many hardships imposed, and the miscarriage of justice was so frequent, under that rule of evidence, the Legislature was induced to abolish it, and to provide that no person should be disqualified from testifying as a witness on account of any interest he might have in the result of the suit. This provision of the section is absolute and not conditional. It means just what it says, that "no person shall be disqualified as a witness in *any civil suit* or proceeding at law or in equity by reason of his *interest*" in the result of the suit. The plain grammatical construction and clear meaning of the provision is, that in all civil causes interest does not disqualify anyone from testifying as a witness therein.

It is true, the same section of the statute in another provision provides that "in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify in his own favor, or in favor of any party to the action claiming under him."

But the disqualification pronounced by the provision of the section last quoted is not because of the *interest* of the witness offered, but because, in the language of the statute, the other party to the contract or cause of action in issue and on trial is *dead*, or is shown to be *insane*.

So it is seen, it is the *death* or *insanity* of one of the original parties to the contract or cause of action that closes the mouth of the other party to the con-

tract, and not his *interest* that disqualifies him as a witness.

The sole purpose of the proviso contained in said section was to silence by law one of the parties to a litigated obligation where death or insanity has silenced the other. [1 Whart., Evid., sec. 466; Meier v. Thieman, 90 Mo. 443.]

In the case at bar, all the testimony regarding the indebtedness of respondent to appellant's husband consisted solely of conversations which took place, according to her testimony, between herself and the respondent. Without those alleged admissions there was not a scintilla of evidence that respondent owed deceased anything. The trial court permitted respondent, over appellant's objection, to contradict her testimony regarding the admissions alleged to have been made by him to her regarding the alleged indebtedness, and permitted him to state what the real conversation was that took place between them. The appellant contends that the action of the court in allowing the respondent to testify was reversible error, because the other party to the contract in issue and on trial was dead, and that under said section 4652 he was not a competent witness for any purpose. All the conversations and transactions testified to by both the appellant and respondent took place between themselves after the death of Weiermueller, and both of them were still living at the time he testified.

This court has many times held that the statute does not exclude the living party from testifying where the evidence relates to transactions and conversations had with others to which the deceased was not a party and with which he had no connection and of which he had no knowledge. [Kirton v. Bull, 168 Mo. 622; Nugent v. Curran, 77 Mo. 323; Eyermann v. Piron, 151 Mo. 107; Banking House v. Rood, 132 Mo. 256; Orr v. Rode, 101 Mo. 387; Wade v. Hardy, 75 Mo. 394.]

The rule announced in these cases is peculiarly applicable to the facts of this case.

There are a few cases in this State which sustain the contention of the appellant, and base their conclusions upon the erroneous assumption that section 4652 leaves the living party to a contract or cause of action in issue and on trial, when the other party thereto is dead, just where the common law placed him, that is, incompetent on account of interest to testify for any purpose. The case of *Curd v. Brown*, 148 Mo. 95, so holds.

That is clearly an erroneous conception of the meaning of that section. No witness was disqualified by the common law from testifying because of the death or insanity of the other party to the contract or cause of action, but was disqualified solely on account of his *interest* in the result of the suit; and as that statute removed the *interest* qualification, he had the absolute right to testify to all transactions and contracts had with others, to which the deceased was not a party and had no knowledge. [*Kirton v. Bull*, 168 Mo. 622.]

Speaking of a similar statute, Judge SHERWOOD well said: "And being itself a remedial section, giving a testifying capacity where none existed before, and all these sections forming but one system, and being construed together as but one statute, they are to be construed liberally; are to receive an equitable interpretation; whereby the letter of the act or section will be sometimes enlarged or sometimes restrained so as the more effectually to meet the beneficial end in view, and prevent a failure of the remedy." [*Ex parte Marmaduke*, 91 Mo. l. c. 257.]

Judge BURGESS, in construing section 8922, Revised Statutes 1889, which is the same as section 4656, Revised Statutes 1899, quoted the language of Judge SHERWOOD with approval. [*Cramer v. Hurt*, 154 Mo. l. c. 118-119.]

The same liberal construction should be given to section 4652, because it is an enabling statute. [Bates v. Forcht, 89 Mo. 121.]

It should be borne in mind that respondent did not pretend to state what were the terms of the contract between himself and the deceased (nor did she for that matter) nor anything that transpired between them. He simply contradicted her evidence and stated what the conversation was that took place between them.

II. The failure of the courts to draw the distinction (though arbitrary as it is) between the rule which is applicable to the surviving party to the contract, where an administrator is a party to the action, and the rule above stated has added much to the confusion involved in the consideration of these questions. In the former the statute expressly disqualifies the surviving party as a witness for all purposes until the will is probated or the executor or administrator has been appointed, while under the latter there is no such disqualification.

In the language of Judge Fox in a recent case before this court, "Speaking for myself, it is difficult to see the reason for this strict rule. What difference does it make whether the conversation was before or after the grant of letters of administration?" [Kersey v. O'Day, 173 Mo. l. c. 570.]

There is no reason for the rule except the cold mandate of the statute, and with that this court has nothing to do except to give it force and effect as we find it when presented to us.

It follows from what has been said that the rule announced in the case of *Curd v. Brown*, 148 Mo. 82, is an erroneous statement of the law, and that case is hereby overruled.

The judgment of the St. Louis Court of Appeals is affirmed.

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All concur, but believe the question involved is of sufficient importance to have the case transferred to the Court in Banc, and it is so ordered.

IN BANC.

PER CURIAM:—Upon a rehearing of this cause by the Court in Banc, the opinion of WOODSON, J., in Division No. One, is adopted, and the judgment of the St. Louis Court of Appeals, affirming the judgment of the circuit court, is affirmed.

SARAH McNULTY v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

In Banc, April 29, 1907.*

1. **NEGLIGENCE: Failure to Ring Bell: Burden: Instruction.** Where one act of negligence charged was failure to ring the bell of the engine which struck plaintiff's child at the crossing, the fact that that failure was the cause of the child's death is essential to plaintiff's recovery for that act of negligence, but by the statute plaintiff is relieved of the burden of proving that fact, and the burden of disproving it is cast on defendant. Hence, an instruction for defendant which tells the jury "that before they can find for plaintiff they must believe that the plaintiff has proven the facts in support of her case by a preponderance of the evidence," is erroneous, because it not only places the burden of proving that fact on plaintiff, but requires her to prove it by the preponderance of the evidence.
2. ———: ———: **Demurrer to Evidence.** Where there is evidence tending to prove that the bell was not rung, and plaintiff's suit for damages is based on defendant's failure to ring the bell, no demurrer to the evidence should be sustained.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

*Note.—Decided November 21, 1906, in Division One. Transferred to Court in Banc, reheard, and divisional opinion adopted April 29, 1907.

AFFIRMED.

L. F. Parker and Woodruff & Mann for appellant.

The instruction complained of was not only proper but it would have been reversible error for the court to have refused it to defendant. That the plaintiff must make out his case by a preponderance, that is, the greater weight of the evidence, is fundamental; is the law of this State and always has been. The doctrine that a prima-facie case shifts the burden of proof does not in any sense impair or infringe upon the rule. *Murray v. Railroad*, 101 Mo. 236; *Schaefer v. Railroad*, 128 Mo. 64; *Casey v. Donovan*, 65 Mo. App. 527; *Marshall Livery Co. v. McKelvy*, 55 Mo. App. 240; *Clifton v. Sparks*, 25 Mo. App. 383; *Jones v. Durham*, 94 Mo. App. 51.

A. R. Taylor for respondent.

As will be seen by section 1102, Revised Statutes 1899, the simple fact that a person on a crossing is struck and injured by an engine being run in violation of that statute makes a prima-facie case of liability against the railroad. The offending instruction, for giving which the trial court granted a new trial, takes no cognizance of the effect of the statute, but requires the plaintiff to prove all the facts to support her case by a preponderance of the evidence. Whereas, after she had proven that her child was killed on the crossing by appellant's engine running without bell, she was not required to prove by a preponderance of the evidence that the running of the engine over the crossing without the bell was the proximate cause of the child's death. The statute itself then puts on the railroad the burden of proving that such violation of the statute was not the cause of the death of the child, and, on this issue, the railroad company had to produce the preponderance of the evidence, and its failure to do so

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would make it liable. *Huckshold v. Railroad*, 90 Mo. 556; *Crumpley v. Railroad*, 111 Mo. App. 157; *Barr v. Railroad*, 30 Mo. App. 256.

IN DIVISION ONE.

BRACE, P. J.—This is an action by the mother to recover damages for the death of her minor child, a daughter, aged about eight years and seven months, who on the 15th of May, 1890, was killed by one of the defendant's engines at the crossing of defendant's tracks over Theresa avenue, in the city of St. Louis. The verdict was for the defendant. Motion for a new trial was sustained, and the defendant appealed. The ground specified by the court upon which the motion for a new trial was sustained is thus stated by the trial judge:

“One ground of negligence charged in the petition as a cause of the death of plaintiff's child, was the alleged failure to sound the bell upon the engine, as required by the statute. This charge was supported by the evidence, and was submitted to the jury in plaintiff's instructions. To make out this charge, it was necessary to show that the failure to ring the bell occurred and that it caused the child's death.

“In defendant's first instruction, the jury were told that the plaintiff must prove ‘the facts in support of her case’ by a preponderance or greater weight of the evidence. This would require such proof of the alleged fact that the failure to ring the bell was the cause of the child's death.

“The effect of the statute, section 1102, R. S. 1899, adopted in 1881, has been to change the law in this respect, so as to make a prima-facie case by proof of the failure to ring the bell accompanied by an injury at the crossing. There need be no proof that the failure caused the injury. The law supplies that proof, and

casts the burden upon the defendant to show that the failure to ring the bell was not the cause of the injury. [Huckshold v. Railroad, 90 Mo. 554, 555-56; Crumpley v. Railroad, 111 Mo. 152, 157; Lane v. Railroad, 132 Mo. 4, 28; Barr v. Railroad, 30 Mo. App. 248, 255-56.]

"It follows that defendant's instruction was erroneous. For this reason the motion for a new trial is sustained."

The instruction referred to in the statement is as follows:

"The court instructs the jury that before they can find for the plaintiff they must believe that the plaintiff has proven the facts in support of her case by a preponderance, that is, by a greater weight of the evidence, and unless she has done so then the verdict should be for the defendant."

One act of negligence charged in the petition was failure to ring the bell, as required by the statute. The fact that the failure to ring the bell was the cause of the death of the deceased was a fact essential to the recovery by plaintiff for this act of negligence. By the statute (R. S. 1899, sec. 1102), the plaintiff was relieved of the burden of proving that fact and the burden of disproving it was cast upon the defendant. But, this instruction, in effect, not only imposed the burden of proving that fact upon the plaintiff but of proving it by a preponderance of the evidence. This was error, for which the new trial should have been granted. And the action of the court in so doing is abundantly supported by the authorities cited by the learned judge, as well as by a very recent case decided by this court at the October Term, 1905, *Green v. Railroad*, 192 Mo. 131-143, in which it was said by *VALLIANT, J.*:

"The statute requiring the signal by bell or whistle was the same prior to 1881 that it is now except in its last clause, which then was in these words: 'and

said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect.' [Sec. 806, R. S. 1879.] But in 1881 the section was amended by striking out these words and inserting in lieu of them these words: 'and said corporation shall also be liable for all damages hereafter sustained at such crossing when such bell shall not be rung or such whistle sounded as required by this section, provided, however, that nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury' (Laws 1881, p. 79), and in that form the statute appears in our present revision (R. S. 1899, sec. 1102). The purpose of that amendment was, as is rightly contended by the plaintiff's counsel, to make the proof of the accident and the proof of failure to give the required signal, sufficient for a prima-facie case and to throw the burden of proving that the accident was not the result of the failure to give the signal on the defendant. It was so decided in *Huckshold v. Railroad*, 90 Mo. 548."

This disposes of the case.

In answer to the suggestion that defendant's demurrer to the evidence ought to have been sustained, it is only necessary to say that there was evidence tending to prove that the bell was not rung, and that the argument in support of the suggestion goes to the weight of the evidence, with which we have nothing to do.

The order of the circuit court granting a new trial is affirmed, and the cause remanded to that court to be proceeded with accordingly.

All concur.

IN BANC.

PER CURIAM:—Upon a rehearing of this cause by the Court in Banc, the opinion of *BRACE*, P. J., in

Division No. One, is adopted and the judgment of the circuit court in granting a new trial affirmed. *Gantt, C. J., Burgess, Valliant, Lamm and Woodson, JJ., concurring; Fox and Graves, JJ., dissenting.*

SNODGRASS, Appellant, v. COPPLE et al.

In Banc, April 29, 1907.

APPELLATE JURISDICTION: Title to Real Estate: Homestead.

An adjudication, upon a motion to quash, that land levied upon under execution is defendant's homestead does not involve title to real estate, and therefore the appeal from a judgment adjudging that the land levied upon was defendant's homestead, is to the proper court of appeals. In determining whether or not homestead exists, the court begins with the necessary concessions that the title is vested in defendant; and a holding that homestead does or does not exist, does not divest that title. A sequence of a judgment that there is no homestead may be to divert defendant's title by sale under execution, but that would be an indirect, not a direct effect of the judgment. In arriving at that judgment, the court does not consider the question of title, but whether the statutory conditions are present which entitle the husband to homestead.

Per Graves, J., with whom Lamm and Woodson, JJ., concur.

1. **APPELLATE JURISDICTION: Homestead.** It is not a mere exemption, but an estate in lands, that vests in the head of a family, and it is not an exemption, but a life estate in lands, that vests in the widow at his death, as the statute declares; and as an adjudication of the existence of a homestead must necessarily determine the existence of that estate, and determine the inchoate right of the widow and children thereto, an appeal from a judgment on a motion to quash the execution on the ground that defendant had a homestead in the land levied upon, necessarily involves title to real estate, within the meaning of the constitutional provision governing appeals—as much so as would a suit in ejectment against the same defendant after sale of the land under execution, where the defense would be the existence of a homestead, and such suit would be appealable to this court alone.

Snodgrass v. Copple.

2. ———: What is Title? "Title to real estate" means an estate for life or for years, as well as a fee simple interest.
3. ———: ———: Questions Involved. Not simply such questions as, is defendant the head of a family? are involved in the homestead inquiry, but the ultimate question is, does defendant have a homestead? And that means, does defendant have a vested estate in the lands? A homestead interest, as created by the statute, is an interest in real estate; and that being the fact, title to real estate is involved in any litigation that determines the existence of a homestead.

Appeal from Livingston Circuit Court.—*Hon. J. W. Alexander*, Judge.

TRANSFERRED TO KANSAS CITY COURT OF APPEALS.

D. E. Adams for appellant.

J. M. Davis & Sons for respondents.

VALLIANT, J.—This cause comes before us at this time on a motion to transfer it to the Kansas City Court of Appeals. The appeal was taken to this court on the theory that title to real estate was involved; if that theory is not correct, then since there is no other issue in the case to bring it within the jurisdiction of this court, we have no jurisdiction of it and the motion to transfer must be sustained.

This is the case: Execution issued on a judgment in favor of plaintiff against defendant and it was by the sheriff levied on certain real estate which the defendant claimed to be exempt from execution because it was his homestead; defendant moved to quash the levy, plaintiff in opposition contended that defendant had abandoned the premises as a homestead. The court heard evidence pro and con and found the issue in favor of defendant, adjudging that the real estate in question was the homestead of defendant and therefore sustained the motion to quash the levy. From that judgment this appeal was taken by the plaintiff.

Is title to real estate involved?

In *Price v. Blankenship*, 144 Mo. l. c. 208, it was said: "To give this court jurisdiction under section 12 of article 6 of the Constitution, because the title to real estate is involved, it must appear that the title to real estate will, in some way, be directly affected by the judgment to be rendered in the case," and that rule we have repeated several times since and we still adhere to it. Unless, therefore, title to real estate will be directly affected by the judgment to be rendered in this case this court has no jurisdiction of the appeal.

There is no doubt but that the judgment to be rendered will be a direct adjudication of the defendant's claim of a homestead in the real estate covered by the levy; as between him and the plaintiff it will determine whether or not he had a right to hold the property exempt from the plaintiff's execution. If right to exemption under the Homestead Statute is title to real estate, then title to real estate is involved in this suit, otherwise not.

There have been several cases before this court in which this question has appeared but it appears in more direct form in this case than in any previous one. Perhaps it will help to elucidate the subject to make a brief reference to the former cases.

McAnaw v. Matthis, 129 Mo. 142, came up for review of an order of the circuit court sustaining a motion to set aside a sale of real estate under execution. It was a money judgment rendered by a justice of the peace, appeal to the circuit court, appeal dismissed, return of execution in justice's office by the constable *nulla bona*, transcript of justice's judgment filed in the office of the circuit clerk, execution from that office, levy and sale of the real estate by the sheriff; the motion to quash the levy and sale was on several grounds going to challenge the validity of the judgment of the justice, the lack of authority in the circuit clerk to is-

sue the execution, and that no notice of the issuance of the execution was served on the defendant. This court decided that the judgment of the justice was valid, that the execution issued in conformity to the law and that no notice to defendant of its issuance was necessary, he being a non-resident of the county, and therefore the motion to set aside the sale should be overruled. Thus we see there was no question of title to real estate in that case at all, the questions were merely as to the validity of the justice's judgment, the regularity of the proceedings and the necessity of notice. The defendant's real estate was only incidentally affected as it might have been by any money judgment rendered against him. The appeal in that case had in the first instance been taken to the Kansas City Court of Appeals and that court sent it here on the idea that title to real estate was involved, and when here no question as to jurisdiction was raised by the counsel and there is no discussion of the subject in the opinion. The taking of jurisdiction of the case by this court appears to have been an oversight. That case was decided in Division No. 1 of this court.

St. Louis Brewing Association v. Howard, 150 Mo. 445, was also a case in which there was no issue which would give this court jurisdiction unless the question of homestead or no homestead was one involving title to real estate, yet this court, Division No. 1, entertained jurisdiction of the case, citing *McAnaw v. Matthis* as authority for so doing. In that case there was a motion to set aside and quash a sale of over 400 acres of land under execution, on the ground that defendant was entitled to a homestead in it. The jurisdiction of the court was not challenged and there was no discussion of the subject.

Afterwards, *Stinson v. Call*, 163 Mo. 323, came before Division No. 2, involving only a question of homestead exemption and the court in deference to what was

said in *McAnaw v. Matthis* entertained jurisdiction, but there was no question of jurisdiction raised in the case and no discussion of the subject. There was this difference, however, between the last-cited case and the one first cited: in the later case the trial court had sustained the motion to set aside the sale of the land under execution on the ground that the land was the defendant's homestead. This court on review of the case held that the defendant did not have a homestead in the land, but affirmed the judgment setting aside the sale under execution on another ground. The motion to set aside that sale is not fully set out in the report but if it fairly tendered the issue of homestead or no homestead and if the judgment of the court was directly responsive to that issue there was a jurisdictional question in the case that distinguished it from the *McAnaw-Matthis* case and would bring it very close to the facts of the case at bar.

In *State ex rel. Reed v. Elliott*, 180 Mo. 658, the judgment was for city taxes on certain land of defendant in the sum of \$76.82 and the same was declared to be a lien on the land. After execution and sale the defendant at a subsequent term moved to set aside the judgment and the sale on certain grounds specified, the motion was overruled and an appeal was taken to the Kansas City Court of Appeals, that court sent the cause here on the ground that title to real estate was involved. But this court was of the opinion that notwithstanding a lien on the land was declared yet there was no title to real estate involved and therefore returned the case to the Court of Appeals. The court in that case, Division No. 1, said: "And the reason is that in all such cases the title is necessarily conceded to be in the defendant, for otherwise the plaintiff would not be entitled to a lien against the land in that suit, and therefore no judgment that could be rendered in the case could divest the title out of the defendant." In the

course of the opinion in that case *McAnaw v. Matthis* is discussed and overruled.

Lawson v. Hammond, 191 Mo. 522, was certified to this court by the St. Louis Court of Appeals under the authority of *McAnaw v. Matthis*, on the idea that title to real estate was involved. In that case a general execution had issued on a money judgment against the defendant and the sheriff had levied the same on a tract of fifty-three acres of defendant's land on which, according to the motion, there was an incumbrance of \$800 and in which also the defendant claimed a homestead exemption. The defendant moved to quash the levy on the grounds that he was entitled to a homestead in the land, and that he had requested the sheriff to appoint commissioners to set aside his homestead but the sheriff refused. The trial court heard the evidence, found that the defendant was entitled to a homestead and sustained the motion to quash the levy. This court held that title to real estate was not involved in that case and for that reason returned it to the St. Louis Court of Appeals. In the opinion in that case *McAnaw v. Matthis* is again discussed and disapproved and *Stinson v. Call*, *supra*, which followed the *McAnaw* case was also overruled.

The difference between *Lawson v. Hammond* and this case is that there the defendant in execution claimed not that all the land levied on was his homestead but that he was entitled to a homestead in the land, that he had requested the sheriff to appoint commissioners to set it off to him but the sheriff had refused the request and was proceeding to sell the whole tract; the plaintiff in execution denied the alleged facts in which the claim of homestead was founded, the trial court found that issue for the defendant and quashed the levy. In that case although in the issues of fact joined on the motion there was a question of homestead or no homestead yet that motion would have been sus-

tained or overruled without a final adjudication that a particular piece of real estate was or was not the defendant's homestead.

In *Moore v. Stemmons*, 192 Mo. 46, there was a motion to quash an execution on the grounds that the judgment was void, that the peculiar title of defendants as trustees was not subject to sale for plaintiff's debt, that the title was held by defendants in trust for the Methodist Episcopal Church of the United States and not for the particular church in Carthage. The trial court overruled the motion and defendants brought the cause here by appeal, but this court was of the opinion that title to real estate was not involved and, no other ground of jurisdiction appearing, the cause was transferred to the Kansas City Court of Appeals. There was really less ground for claiming that title to real estate was involved in that case than in *Lawson v. Hammond*, *supra*. The court could not on a motion to quash an execution try the question of whether or not the land claimed by defendants to be held by them in trust for one religious body, was liable to be sold under execution to satisfy a judgment against what was claimed to be another religious body.

Thus it will be seen that whilst in some of the cases that have been before us on the question of jurisdiction there has been a question of homestead or no homestead, and the court has held in those cases that that question was not one of title to real estate, yet this is the first case that has come before us in which the judgment to be rendered will decide whether or not the defendant in execution is entitled to hold the particular piece of property as a homestead exemption. There is more reason for the contention that title to real estate is involved in this case than there was in any of the cases above mentioned, because in this case if the judgment is against the defendant it will be a direct adjudication that he is not entitled to hold that particular

piece of real estate as his statutory homestead and it will pass under the sheriff's hammer, and on the other hand if the judgment is in his favor he can, so far as this plaintiff claiming under this execution is concerned, hold the property by the right which the homestead exemption statute creates. Is that peculiar statutory right a title to real estate? The precise question we are now considering was not specifically answered in either of the cases above decided but the reasons given by the court for its rulings in *State ex rel. v. Elliott*, 180 Mo. 658, and *Lawson v. Hammond*, 191 Mo. 522, apply with full force to this case and we cannot now say the title to real estate is involved in this case without overruling the two cases just mentioned and that we are unwilling to do.

On the trial of the issues involved in this motion the court will begin with the necessary concession on the part of both parties that the title to the property is well vested in the defendant. But the defendant says, if the plaintiff is to have his way my title will be divested; that brings us to the very point of the controversy. Defendant's title will not be divested by the judgment in the case, but the judgment will leave the defendant's property exposed to the sheriff's levy and the result of that levy with the sequence may be to divest the defendant of his title. But that is the indirect not the direct effect of the judgment.

On the hearing of this motion the court was required to find an answer to these questions: is the defendant the head of the family, does he live on these premises as his family home, is the property within the limit of value and area prescribed by the statute, did his title and occupancy as a homestead exist before the debt on which the judgment is founded was incurred, and has it so continued down to date?

We hold that in the trial of those issues and the

judgment to be rendered on the findings either way the title to real estate is not involved.

The motion to transfer to the Kansas City Court of Appeals is sustained, and it is ordered that the cause be so transferred.

Gantt, C. J., Burgess and Fox, JJ., concur; Lamm, Graves and Woodson, JJ., dissent.

DISSENTING OPINION.

GRAVES, J.—We cannot concur in the opinion of Judge VALLIANT in this case. However, his statement of the case, as to the facts, is correct, even to detail, and his conclusion as to the exact question involved is correct. We differ with him as to his conclusion of law. We have no desire to curtail the jurisdiction of the appellate courts on the one hand, nor to add to our jurisdiction upon the other. Such is the spirit of the court. If the Constitution places the burden of hearing these cases upon this court, we, and each member of the court, feel that we should assume it, but if placed upon the Courts of Appeal, we feel and know that the issues will be as fully and ably determined as we could hope to do, so that the whole issue is one of pure law, and of our views thereon and not otherwise.

The question in this case is, what is the character of the homestead right given by our statute? Is it an interest in real estate, amounting to, “a title to real estate,” within the meaning of section 12, article 6 of our Constitution, or is it not? In other words, is the homestead interest a “title to real estate?”

With due deference to the cases heretofore passed upon by this court, the exact question here involved has never been discussed from principle. Judge VALLIANT, with diligence and ability, has found and reviewed them all, but in none of these cases is the homestead right, in its character and nature, fully discussed.

If a homestead interest is "a title to real estate" then the jurisdiction of this case is in this court. If not it is in the Court of Appeals. As a lawyer we would never try a homestead right upon a motion, for the reason that, in our judgment, a trial of that fact, if against us, was final, and as a judge, upon this point we have not been further enlightened, save by the opinion of Judge VALLIANT, wherein he admits that if a motion is filed, raising the question, and such question upon trial is determined against the party filing the motion, the homestead interest, whatever it be, is gone. In this he is correct, for as we understand the law of *res adjudicata*, where a question of fact has been determined, by a court of law having the necessary jurisdiction, such question cannot be further litigated between the parties or their privies. This court has so held. [Johnson v. Latta, 84 Mo. l. c. 142; State ex rel. Waters v. Hunter, 98 Mo. 386; Bennett's Admr. v. Russell, 39 Mo. 152; Ridgley v. Stillwell, 27 Mo. 128.]

Now, in the case at bar, this defendant had the right to move to quash the levy upon his homestead—if he chose that method of raising the issues. He might have waited, and in practice it might be considered the better plan, until the sale was made and an action was brought in ejectment to oust him. Suppose this defendant had waited until the sale had been made before asserting that the house and lot was his homestead, and then when the purchaser at the sale brought his action in ejectment for the property, the defendant had filed his answer, alleging, as he has alleged in the motion, that the levy was void, and therefore the sale thereunder was void, because the property was his homestead. Such answer would be proper and if the facts were shown would defeat the action. If appeal were taken by either side, in such action in ejectment, no one would question for a moment that the jurisdiction would be in this court. Now what is the difference be-

tween the fact to be determined in the supposed case, and the case at bar? None, whatever. In either case you determine the one question as to whether or not there was a homestead interest. In the one we say there is jurisdiction in this court, and in the other we say not, when as a matter of fact the same question is involved in both, i. e., was the house and lot the homestead of the defendant, at the time of the levy thereon? And further, in this identical case, suppose the case is transferred, and the Court of Appeals says that there is no homestead, then in the view of Judge VALLIANT in which we think he is correct, the homestead is gone, and that question of fact so litigated, whether upon motion or otherwise, is *res adjudicata*, not only as to him, but as to his wife and children. By the peculiar wording of our statute, the wife and children take the homestead through the husband, and in law are his privies. [R. S. 1899, sec. 3620.] This statute reads:

“If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow; that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto.”

Now what vests, a mere exemption privilege, or an estate in lands? An exemption privilege is personal and does not pass by the law of descent to the widow or heirs. Nor does it "vest" in them. We, as members of a court, do not talk of personal privileges or immunities *vesting* in our widows or heirs, nor does the Legislature mean to say that it intended to *vest* a mere personal privilege or immunity in the widow or heir. But further, this court has always held that the widow's estate in a homestead is, in effect, a life estate, and how could a life estate vest in the widow from the husband, if the homestead interest of the husband was a mere immunity from levy and sale? Again, the statute, section 3616, says: "The husband shall be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void." What does this mean? Does it mean that the husband cannot yield up a personal privilege or immunity granted to him, or does it mean that for the public welfare the State has stepped in and said to him, that in your conceded fee simple estate, or less estate, if such it be, we have created another estate for the benefit of yourself, your widow and your children, and this estate, i. e., title to this land, you cannot sell except as we have provided, and in the event of your death this estate, which we have created, as a matter of public policy, shall vest in your widow and children, during the minority of the children, and afterwards for the life or widowhood of your widow? The statute does not undertake to create a separate immunity and privilege in the widow and children, but says the "homestead to the value aforesaid shall *pass to* and *vest in* such widow or children, until the youngest child shall attain its legal majority and until the death of such widow." The right of the wife is limited to wid-

owhood under the present statute, but this still leaves in her an estate for years, which may or may not be determined prior to death, dependent upon a contingency, i. e., marriage. If she continues a widow, her estate is for life. It is, to say the least, an estate in lands, and when in controversy, her title to lands is involved. All of which passes and vests in her through her husband. Again, the same section provides for the joint occupancy of these lands by the widow and children, until such time as the youngest child becomes of age, and then the sole occupancy by the widow until her death, or her remarriage. What did the Legislature mean by joint occupancy? A joint occupancy of a mere right or immunity given to the husband or of a title to an estate or interest in lands, which the statute has created, and in the language of the law has vested in the widow and children? In our judgment immunity for the widow and children can be created by legislative power, but it is straining a point to say that we *vest* an immunity heretofore created in the widow and children. Such is not the ordinary acceptance of the word "vest," nor in our judgment is it the legal acceptance.

And, further, this same section 3620, in speaking of the estate or interest which "shall pass to and vest" in the widow and children, further says, "And shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime." What did and what could the Legislature have meant by this language? Did it mean that a mere exemption or immunity from debt "shall continue for their benefit, without being subject to the payment of the *debts* of the deceased," or did it mean that this particular estate in the land, i. e., homestead, should not be so subjected? Does it require any strained construction to determine the meaning of this language? In plain parlance, would we

say or understand that a mere exemption or immunity from debt shall not be "subject to the payment of the debts of the deceased?" We must conclude that there was a property right, which might be subject to the payment of debts, and if so, it is a right or interest in real estate. This whole question must be determined largely by our statute and the terms thereof.

In our judgment the homestead right, in the husband, is an estate of freehold, i. e., for his life, unless legally disposed of during his life, and if not so disposed of such estate vests in the widow and children, as aforesaid. It is not always based upon a fee title, but may be based upon and carved out of a title less than a fee, but out of whatever interest in lands it is carved out of or from, it nevertheless is an interest in the land and when questioned in litigation the title to real estate is involved.

We know that there is diversity of opinion among the courts respecting the exact character of this peculiar interest in lands denominated homestead, such character depending largely upon the respective statutes. [21 Cyc. 460.]

In Nebraska, *McLain v. Maricle*, 60 Neb. 353, it is characterized: "A special or particular interest in real estate created by statute, and the character of the interest thus acquired has a marked variance in the different States." In some States, as Georgia, *Harris v. Glenn*, 56 Ga. 94; Kansas, *Ellinger v. Thomas*, 64 Kan. 180; Kentucky, *Brame v. Craig*, 12 Bush 404; North Carolina, *Thomas v. Fulford*, 117 N. C. 667; South Carolina, *Ex parte Ray*, 20 S. C. 246, the homestead right has been looked upon as a mere exemption and not an interest in lands. In others it has variously been declared an estate in lands ranging from a fee down to a freehold estate: *Hirsch v. Prescott*, 89 Fed. 52; *Jones v. DeGraffenreid*, 60 Ala. 145; *Snell v. Snell*, 123 Ill. 403; *Browning v. Harris*, 99 Ill. 456; *Swan v.*

Stephens, 99 Mass. 7; Abbott v. Abbott, 97 Mass. 136; Helm v. Kaddatz, 107 Ill. App. 413; Sayers v. Childers, 112 Iowa 677; Chase v. Abbott, 20 Iowa 154; Fauver v. Fleenor, 13 Lea (Tenn.) 622. So it would seem that we must construe this interest according to our own statutes, and in the light of these, let us see whether this interest, i. e., homestead, is a mere exemption, or an interest in land. We had a statute formerly, which "passed to and vested in" the widow a fee. [Skouten v. Wood, 57 Mo. 380.] After this opinion, the statute was amended in 1875, and placed in its present form, except we have later made the widow's interest terminate with her remarriage, but if she did not remarry, then to terminate with her death. Under the act of 1875, in West v. McMullen, 112 Mo. l. c. 411, GANNT, P. J., said:

"We think the statute vested in the widow and minor children, if any, an estate for her life, and during their minority, and not a mere right of occupancy. Decisions upon statutes essentially different from ours throw no light upon the question. But our own decisions and those of the Vermont courts and of New Hampshire, under the act of 1868, determine that the homestead is a life estate in land, and not a mere exemption dependent upon occupancy, and being a vested life estate, the widow may use or rent it as she sees fit during her life. [Rockhey v. Rockhey, 97 Mo. 76; Freund v. McCall, 73 Mo. 343; Lake v. Page, 63 N. H. 318; Skouten v. Wood, 57 Mo. 380, and cases cited; Day v. Adams, 42 Vt. 516.]"

Bear in mind this classifies the right of the widow and children as an estate in land, not as a mere exemption or immunity from debt. Such a construction gives life to the statute which provides that the homestead of the husband "shall pass to and vest in" the widow and children. We can understand how an estate in lands can "pass to and vest in" a given per-

son, but can hardly understand that the Legislature had in mind the idea of merely passing to and vesting in the widow, children, or heirs at law, a mere personal privilege or immunity from debt given to the husband.

Again, BLACK, J., in *Hufschmidt v. Gross*, 112 Mo. l. c. 656, in discussing the same section discussed in the case by GANTT, P. J., viz., sec. 2693, Revised Statutes 1879, says:

“This section makes the homestead, not merely a right of exemption, pass to and vest in the widow and minor children, without being subject to the payment of the debts of the deceased. The same section speaks of this interest which is to pass to the widow and minor children as an estate. This estate which passes to them is not conditional, that is to say, it is not made to depend upon occupancy by her or the children, as in the case of the homestead exemption under the first section. Again, section 2694 provides that, on setting out homestead and dower to the widow, the homestead must be first set out, and dower in the residue of the lands of the deceased is diminished by the amount of the interest of the widow in such homestead so set out to her. [See, also, *Bryan v. Rhoades*, 96 Mo. 485.] It was not the intention of the Legislature to substitute a mere exemption right for the dower estate or any part thereof.”

It is true the section now in force, section 3620, is not in exact phraseology as was the original act of 1875, but we have this significant clause therein in addition to the ones above quoted: “And upon her [the widow’s] death or remarriage it [the homestead] shall pass to the heirs of the husband.” What shall pass to the heirs of the husband? The mere exemption or immunity from debt, or some estate, title or interest in the land. We can see no escape, under our statute, from the conclusion that the homestead is an interest in the land, and that in a case, as the one at bar, where the

sole issue is, was there or was there not, a homestead, an interest or title to real estate is at stake and in issue, so much so as to give this court the jurisdiction.

West v. McMullen, 112 Mo. 405, is quoted with further approval by GANTT, J., in *Spratt v. Early*, 169 Mo. l. c. 363. And again, by Fox, J., in *Clark v. Thias*, 173 Mo. 649. True it is that the point here urged was not necessarily involved in the approval thus given to that case, in the latter two cases. But we have always held, as in the latter two cases stated, that a conveyance of a homestead although made for the purpose of defrauding creditors was not void and would convey title. Why? Because the instrument making the conveyance conveyed a mere exemption or immunity from debt, or because it conveyed some substantial interest in real estate, created by the statute? We think it the latter rather than the former.

And further, if as we hold in the cases above cited, the right when vested in the widow is a life estate, and therefore an interest in and title to lands, by what process of reasoning can we say that the interest of the husband is less than that held by the wife? If it is an estate or interest in lands in one it must be in the other.

But beyond all this what does "title to real estate" mean? It does not mean that one must have a fee simple interest therein, but it certainly goes to the extent of an estate for life or for years, which includes the interest of a homestead. The homestead once fixed is a life interest in the husband, with the power to alienate by deed or mortgage, provided he be joined therein by the wife, and with the further power to lose it by abandonment. It is a freehold estate, which may be determined by the act of the owner. Its duration is uncertain, distinguishing it in a way from an estate less than a freehold. It may last for life or it may not. Its termination is uncertain. "Title" does not necessarily mean a fee interest, but covers all the lesser estates in

land. [See vol. 8, Words and Phrases Judicially Defined, subject, Title, page 6980, et seq.]

We have no disposition to prolong this opinion further than to present the idea firmly fixed with us, and that is that a homestead interest is an estate in lands, and where, whether upon motion to quash a levy under execution, or in a suit in ejectment, such right is the one to be determined, then the title to real estate is involved.

We do not concur with Judge VALLIANT, when he says the only questions involved on this motion are “(1) is the defendant the head of a family? (2) does he live upon these premises as his family home? (3) is the property within the limit of value and area prescribed by the statute? (4) did his title and occupancy as a homestead exist before the debt on which the judgment was founded was incurred, and has it so continued down to date?” These questions were involved, it is true, but the ultimate question to be determined in the case, simply stated, is this: Did the defendant have a homestead? Answers to all the questions suggested by Judge VALLIANT simply tend to prove or disprove the ultimate fact to be found, viz., was there a homestead? Of course, all these questions would have to be answered in the affirmative before the ultimate question could be answered in the affirmative, but that does not change the proposition that the real question and the ultimate question, thus on trial, was, did this man have a homestead interest?

If you set up the claim of an estate by curtesy you have four things to prove: (1) marriage, (2) seizure during coverture, (3) issue born alive, (4) death of wife; yet none of us would say, because these four simple issues were the only ones to be passed upon by the court, title to real estate was not involved. The ultimate fact in such case would be, was there curtesy? and

if so title to real estate would be involved, although it would be but a life estate. In the case at bar we have a life estate, which may be terminated of course by the act of the owner. All life estates may be so terminated.

The only question in the case at bar can be thus stated: Is a homestead interest, as created by our statute, an interest in real estate? If it is, then title to real estate is involved. If it is a mere exemption, then title to real estate is not involved. We think it is an interest in real estate, if we have been able to analyze our statutes, and so believing, we think the jurisdiction of this case is in this court, and the motion to transfer should be overruled. *Lamm and Woodson, JJ.*, concur in this opinion.

PATRICK F. KELERHER and WILLIAM C. LITTLE, Appellants, v. JOHN B. HENDERSON, Appellant.

In Banc, April 29, 1907.

1. **PLEADING: New Matter: General Denial.** Under the statute, when new matter is relied upon, in defense or in evidence, it must be set up in the answer. A general denial is not sufficient. If defendant intends to rely upon new matter which goes to defeat or avoid plaintiff's action, he must set forth in clear and concise terms each substantial fact intended to be so relied upon.
2. ———: ———: ———: **Champertous Contract.** Where plaintiff sues on a contract which contains no allegation in reference to champerty, defendant will not be permitted to interpose the defense of champerty unless he pleads it in his answer. That is "new matter" within the meaning of the Practice Act

Kelerher and Little v. Henderson.

3. ———: ———: ———: ———: On Face. The rule that when a contract is offered in evidence and its immorality and illegality appear on its face a recovery will be denied even though the answer is a general denial, does not apply where the client agrees to pay one-half of any and all reasonable expenses or sums of money that may be necessary and proper to insure the successful prosecution of the suit, for such a contract is not champertous on its face. It cannot be said to be an agreement to pay costs of the suit.
4. ATTORNEY: Champertous Contract: Expenses. There are many necessary and proper expenses an attorney may contract to pay in connection with the prosecution of a lawsuit.
5. ———: ———: Costs. In one contract the clients (plaintiffs) agreed to pay one-half of all reasonable expenses that may be necessary and proper to expend for a successful prosecution of suits on county bonds, and that contract referred to another between the attorneys (defendants) and the bondholders in which the attorneys agreed to pay all costs of whatever nature in case of the loss of any suit. *Held*, in a suit by the clients against the attorneys for their proportion of the moneys realized from the suits, that even if the agreement as a whole be construed to mean that the attorneys would pay one-half of the costs of the suits, that was their fault, and it should not be visited on the plaintiffs in the face of their express agreement to pay one half of all proper and reasonable expenses.
6. CHAMPERTY. The law of champerty exists in this State.
7. ———: Contract Must Be Champertous. The law does not impress its condemnation upon the subject-matter of the contract, but upon the contract itself. If the contract itself is not champertous, the court will not, when suit is brought on the contract, refused to enforce it simply because certain collateral portions of the contract or of the transaction are tainted with illegality.
8. COUNTERCLAIM: Practice. Affirmative defenses and counterclaims stand on the same footing that the petition does, and if no evidence is introduced in support thereof, they should be dismissed.

Appeal from St. Louis City Circuit Court.—*Hon. Warwick Hough*, Judge.

REVERSED AND REMANDED.

Collins & Chappell and Joseph H. Zumbalen for plaintiffs-appellants.

(1) The contract sued on is not of a champertous nature. 4 Blackstone's Commentaries, p. 135; *Duke v. Harper*, 66 Mo. 56. (2) The contract between Henderson & Shields and the bondholders is no part of the contract between Henderson & Shields and Kelerher & Co. (3) It is incompetent for defendant to set up the alleged illegality of the contract with the bondholders as a defense to this case. *Vette v. Geist*, 155 Mo. 27; *Crane v. Whittemore*, 4 Mo. App. 510. (4) The defense of champerty is a personal privilege and can not be made use of by a person other than a defendant when sued on the champertous contract. *Bick v. Overfelt*, 88 Mo. App. 139. (5) The defense of champerty is an affirmative defense and must be pleaded. *Moore v. Ringo*, 82 Mo. 473; *McDearmott v. Sedgwick*, 140 Mo. 182. (6) Even if defendant could avail himself of the defense of champerty in this case, it was error on the part of the referee to refuse to hear further testimony and to recommend a finding and judgment against plaintiffs. 5 Am. and Eng. Ency. Law (2 Ed.), 820. (7) The doctrine of champerty does not obtain in the State of Missouri.

E. P. Johnson and Barclay; Shields & Fauntleroy for defendant-appellant.

(1) The clause in the contract which is set forth in the petition "that said P. F. Kelerher & Company shall pay one-half of any and all reasonable expenses or sums of money that may be necessary and proper for us to expend to insure the successful prosecution of said suit," is a condition precedent to the right of plaintiff to recover, and a compliance with it must have been alleged in the petition either specially or generally, or an excuse for not having so alleged, or it failed to state any cause of action. *Bays v. Ambrose*,

32 Mo. 486; Denny v. Kile, 16 Mo. 454; Turner v. Mellier, 59 Mo. 535; Dinsmore v. Livingston County, 60 Mo. 244; Laclede Construction Co. v. Tudor Iron Works, 169 Mo. 155; St. Louis v. Cruikshank, 16 Mo. App. 496; Roy v. Boteler, 40 Mo. App. 222; Price v. Protection Co., 77 Mo. App. 240; Way v. Miller, 80 Mo. App. 385; Fairbanks, Morse & Co. v. Mining & Mfg. Co., 105 Mo. App. 652. And the objection of defendant to permitting plaintiffs to introduce any evidence on account of such failure to plead performance of said terms of said contract on their part should have been sustained. Murphy v. Ins. Co., 70 Mo. App. 83; Pier v. Heinrichoffen, 52 Mo. 335; Fairbanks, Morse & Co. v. Mining & Mfg. Co., 105 Mo. App. 652; Roy v. Boteler, 40 Mo. App. 222; Price v. Protection Co., 77 Mo. App. 240; Stout v. St. Louis Tribune Co., 52 Mo. 346; Garner v. McCullough, 48 Mo. 318. (2) A contract may be contained in several instruments, all of which may be read as one, and it is not necessary that they, in terms, refer to each other, or that the parties to them be the same. Parlin & Orendorf Co. v. Boatman, 84 Mo. App. 67; Sexton v. Anderson, 95 Mo. 373; Houch v. Frisbee, 66 Mo. App. 16; Jennings v. Todd, 118 Mo. 296; McDonald v. Wolff, 40 Mo. App. 302. (3) The bondholders' contract with Henderson & Shields is illegal, this suit is an attempt by them to speculate on their principals for their own private gain and, therefore, this action cannot be maintained by them. Rea v. Copelin, 47 Mo. 46; Grumley v. Webb, 44 Mo. 444; Bent v. Priest, 86 Mo. 475; Exter v. Sawyer, 146 Mo. 302; Newman v. Newman, 152 Mo. 398; 15 Am. and Eng. Ency. Law (2 Ed.), 945; Atlee v. Fink, 75 Mo. 100; Green v. Corrigan, 87 Mo. 359; Forsyth v. Woods, 11 Wall. (78 U. S.), 484; Megwire v. Corwine, 101 U. S. 108; Goodrich v. Tenny, 144 Ill. 422; Byrd v. Hughes, 84 Ill. 174; Carpenter v. Taylor, 164 N. Y. 178; Ridenbaugh v. Young, 145 Mo. 274; Tyler v. Lari-

more, 19 Mo. App. 445; Brick v. Seal, 45 Mo. App. 475; Gwinn v. Simes, 61 Mo. 339; Wolf v. Duncan, 80 Mo. App. 421; Sprague v. Rooney, 104 Mo. 349; St. Louis Fair Association v. Carmody, 151 Mo. 566. (4) An agreement to pay costs and receive a portion of the proceeds is champerty. 5 Am. and Eng. Ency. Law (2 Ed.), 815 and 816; Euneau v. Rieger, 105 Mo. 680; Duke v. Harper, 66 Mo. 51; Bent v. Priest, 10 Mo. App. 543, 86 Mo. 475; Million v. Olmsorg, 10 Mo. App. 432; Bent v. Lewis, 15 Mo. App. 40; Moore v. Ringe, 82 Mo. 468; Pike v. Martindale, 91 Mo. 268; Comstock v. Flower, 109 Mo. App. 275; Railroad v. Johnson, 29 Kan. 218; Quigley v. Thompson, 53 Ind. 317; Hyatt v. Railroad, 68 Iowa 662; Low v. Hutchinson, 37 Maine 196; Belding v. Smythe, 138 Mass. 530.

IN DIVISION ONE.

WOODSON, J.—This is a suit which was instituted in the circuit court of the city of St. Louis, and based upon a written contract which is set out in the petition.

The petition, in substance, alleges that at all times therein mentioned the plaintiffs were copartners in business under the firm name of P. F. Kelerher & Co.; that defendant and one George H. Shields were copartners in business under the firm name and style of Henderson & Shields, engaged in the practice of law; that at the city of St. Louis, on or about the 20th day of February, 1878, the said firm of Henderson & Shields, of which defendant was a member, entered into the following written agreement with the plaintiffs, to-wit:

“It is hereby agreed by the undersigned that for and in consideration of the services rendered by P. F. Kelerher & Co. in procuring from the bondholders of Knox county, Missouri, a certain lot of bonds and past due coupons as described in a receipt given to said

P. F. Kelerher & Co., as trustees, this day and to be sued upon in accordance with a contract appended to said receipt to pay said P. F. Kelerher & Co. 50%—one-half of the fee accruing to us in accordance to the terms of said contract. It being understood that said P. F. Kelerher & Co. shall pay one-half of any and all reasonable expenses or sums of money that may be necessary and proper for us to expend to insure the successful prosecution of said suit. In other words, said P. F. Kelerher & Co. to share equally with us in the expenses and profits accruing from said suit," and dated at St. Louis, February 20, 1878; that said contract appended to said receipt provided that Henderson & Shields were to receive as a fee for the legal services to be rendered by them twenty-five per cent of the total amount of bonds and coupons involved in the suit or suits which they might bring; that plaintiffs did procure from various bondholders of Knox county, Missouri, a large number of bonds and turned them over to the firm of Henderson & Shields to be sued upon according to the contract appended to said receipt; and that in pursuance of said agreements Henderson & Shields did institute suits upon said bonds and coupons and prosecuted same to final judgment and received as their fee in said matter, on or about the 1st day of October, 1894, the sum of twenty thousand dollars, and that by reason of the premises the defendant became indebted to the plaintiffs in the sum of ten thousand dollars, which sum plaintiff demanded of defendant, on or about October 17, 1894, which was refused and is still due and unpaid.

The prayer of the petition is for a judgment for the ten thousand dollars and six per cent interest from October 17, 1894.

The answer of defendant admits the copartnership of plaintiffs, the copartnership of defendant and said Shields, and that the firm of Henderson & Shields

executed the contract of February 20, 1878, set out in the petition, and denies all other allegations in the petition.

The answer further, substantially, states that plaintiffs procured from various persons certain bonds and coupons and coupons of other bonds, of Knox county, Missouri, and turned them over to Henderson & Shields, to be sued upon by said firm, in the name of Samuel C. Davis, and that said firm, with the consent and at the request of plaintiffs, instituted a suit thereon in the name of said Davis, in the circuit court of the United States, against Knox county, and recovered judgment thereon, on March 22, 1878, for the sum of \$16,975.35; that in the prosecution of said suit it became necessary and proper for defendant to expend, and he did expend divers and large sums of money, aggregating the sum of \$5,911.06, the items of which appear in an attached account, a sum in excess of the sum received or contracted to have been received by said Henderson & Shields from the owners of bonds; that plaintiffs were fully advised of the making of said expenditures and admitted the reasonableness and necessity of making same; the defendant demanded of plaintiffs one-half of said sum so paid by him, which they refused to pay, and asks judgment for said sum and interest.

Defendant for further answer and counterclaim states, that there were placed in the hands of plaintiffs, by the owners thereof, two other bonds for the sum of five hundred dollars each with coupons attached, of said Knox county, Missouri, which, under the provisions of the contract set out in the petition, should have been turned over to Henderson & Shields, to be sued upon by them, but that plaintiffs, in violation of their duty, failed and refused to turn same over to said Henderson & Shields, and wrongfully converted them to their own use, to defendant's damage in the

sum of five hundred dollars. That said firm of Henderson & Shields was dissolved January 1, 1883, and its affairs have been fully settled, and said George H. Shields has assigned to defendant his interest in said claim for damages, and, for which with interest, defendant asks judgment.

Defendant for further answer and counterclaim states, that on June 27, 1887, plaintiffs sold said last two bonds and coupons to L. A. Coquard, with all interest accrued thereon, with the amount of judgment obtained on coupons formally attached to them, aggregating the sum of \$2,203.58, in consideration and for which said Coquard paid the sum of \$743.75. That plaintiffs delivered to said Coquard only one of said bonds, and refused to deliver to him the other one, by which Coquard was damaged in the sum of \$1,600. That said Coquard for value received assigned said claim to defendant, for which he asks judgment, with interest.

Defendant for further answer says, that on the 8th day of April, 1889, plaintiff William C. Little, for value received, assigned to defendant all of his right, title and interest that he might be or become entitled to under the contract set out in the petition, wherefore defendant says said Little is not a necessary or proper party to this suit.

To this answer plaintiffs file separate replies, Kelerher's being a general denial of every allegation in the answer.

Little denies all the allegations in the answer excepting the fifth paragraph thereof, and in reply to that says that he made the assignment stated therein, not absolutely, but as collateral security for an indebtedness owing by him to defendant, which was much smaller than the value of the said security.

On the pleadings the case was, by agreement of parties, referred to John F. Dryden, as referee, to

try all of the issues of the case. Upon the trial before the referee the plaintiffs introduced the following evidence:

First, the contract, dated February 20, 1878, signed by Henderson & Shields, and set out in the petition:

Second. A receipt from Henderson & Shields to P. F. Kelerher & Co., and in connection therewith a printed form of letter from Henderson & Shields to bondholders, the printed letter not being signed in any other manner than having the name of Henderson & Shields printed upon it. The said receipt is in the following language:

“St. Louis, February 20, 1878. Received of P. F. Kelerher & Co., trustees, for the purpose of bringing suit in the U. S. Federal Courts the following described bonds and coupons of Knox county, Missouri, issued in behalf of the Mississippi and Missouri R. R. Company, to-wit: [then are enumerated a large number of bonds and past due coupons; \$13,504 in face value thereof belonged to Samuel C. Davis & Co., \$1,400 to C. R. Walther, \$1,120 to Catherine A. Thornbury, executrix, and \$280 to Stover]; said suit to be brought according to the terms of agreement herewith printed.

“HENDERSON & SHIELDS.”

The letter or agreement appended to said receipt is printed, and is as follows:

“St. Louis 187

“To the bondholders,

“Of

“

“It is hereby proposed by the undersigned to institute and prosecute to final judgment a suit or suits in the circuit and supreme courts of the United States at own proper cost, charge and expense on the matured coupons from bonds of the county of State of Missouri, issued in behalf of Township to

Kelerher and Little v. Henderson.

..... and dated day of
18....

"And upon obtaining final judgment in favor of the bondholders, to receive for services rendered therein, twenty-five per cent of the total amount of bonds and coupons involved in such suit, which shall constitute the full and entire fee to be paid us. In case of loss of any such suit, we hereby obligate and bind ourselves to pay all costs thereon, of whatever nature, and to be entitled to no fee whatever, or other claim upon said bondholders. Provided, however, that we shall not be required to institute any suit until the amount of coupons suable against any one county in one proceeding, shall reach the sum of \$5,000. And provided further, that not less than twenty-five per cent of the bonds—the coupons of which are to be sued upon, shall be deposited with P. F. Kelerher & Co., of St. Louis, to be held by them, in trust, for the fulfillment of the terms and conditions of this proposition.

"All communications to be addressed to P. F. Kelerher & Co., 307 North Third street, St. Louis.

"HENDERSON & SHIELDS.

"Messrs. P. F. Kelerher & Co., St. Louis:

"In accordance with the above proposition I hand you herewith the following matured coupons: at \$. each \$., also \$. in bonds, as described in said proposition, to be held by you in trust for the just and correct fulfillment of above proposal which is agreed to by the undersigned.

"Witness:

"....."

Third. A contract between Henderson & Shields and Samuel C. Davis & Co., dated St. Louis, December 6, 1877, which is as follows:

**"To the Bondholders
of Knox County,
State of Missouri:**

"It is hereby proposed by the undersigned to institute and prosecute to final judgment a suit or suits, in the circuit and supreme courts of the United States, at own proper costs, charges and expense, of the matured coupons of the county of Knox, State of Missouri, issued in behalf of and to the Missouri & Mississippi R. R. Co., and dated first day of February, 1868. And upon obtaining final judgment in favor of the bondholders, to receive for services rendered therein twenty-five per cent of the total amount of bonds and coupons involved in such suits, which shall constitute the full and entire fee to be paid to us. In case of loss of any such suit, we hereby obligate and bind ourselves to pay all costs thereof, of whatever nature, and to be entitled to no fee whatever, or other claim upon said bondholders.

"Provided, however, that we shall not be required to institute any suit until the amount of coupons suable against any one county in one proceeding, shall reach the sum of \$5,000.

"And provided further that not less than twenty-five per cent of the bonds—the coupons of which are to be sued upon, shall be deposited with P. F. Kelerher & Co., of St. Louis, to be held by them, in trust, for the fulfillment of the terms and conditions of this proposition.

"All communications to be addressed to P. F. Kelerher & Co., 307 North Third street, St. Louis.

"HENDERSON & SHIELDS.

"Messrs. P. F. Kelerher & Co., St. Louis:

"In accordance with the above proposition, we hand you herewith the following matured coupons:

"84 at \$35.60 each \$2,954.

"Also \$10,550, in bonds, as described in said proposi-

tion to be held by you in trust for the just and correct fulfillment of the above proposition, which is agreed to by the undersigned.

“SAMUEL C. DAVIS & Co.

“Witness:

“WM. H. GRANT.”

Plaintiff also introduced three other contracts, all similar to the above and signed by Henderson & Shields, and varying only in the dates, and the numbers and amounts of the bonds and coupons deposited. One of the deposits was signed by Charles F. Walther, one by Catherine A. Thornbury, Executrix, and the other by Emanuel Stover.

Fifth. The plaintiffs offered the record of the case of Samuel C. Davis against Knox county, Missouri, in the circuit court of the United States, for the Eastern District of Missouri.

At this point defendant objected, not only to the admission of that record, but to the reception of any further evidence in the case, for the reason that the documents put in evidence by the plaintiffs show that the cause of action is void on two grounds—first, because they show that the plaintiffs were speculating on their principals; and, second, that the contract between plaintiffs and defendant is champertous; and suggested that no further proceedings be had in the case.

The referee sustained the objection, and plaintiffs duly excepted.

Plaintiffs then offered to prove that Henderson & Shields instituted suits upon all the bonds and coupons mentioned or referred to in the receipt from Henderson & Shields to Kelerher & Co., dated February 20, 1878; that they prosecuted those suits to final judgment, collected the judgments and received from Samuel C. Davis & Co., Charles F. Walther, C. A. Thornbury, Executrix, and Emanuel Stover, a fee of twenty-

five per cent of the amount received in each instance, aggregating the sum of \$10,000, and that after the collection of the fees, Kelerher & Co., as early as October 17, 1894, demanded of Henderson & Shields the payment of one-half of said fees; that accountings have been had between the plaintiffs and defendant with reference to the amount owing by Henderson & Shields to Kelerher & Co., under the terms of the contract sued on, dated February 20, 1878, and that the only disputes with reference thereto were, first, as to whether or not under the terms of said contract Kelerher & Co. were entitled to a share in the fees arising from a suit by Henderson & Shields on the bonds in the case of Walther, Thornbury and Stover, or simply on the coupons in the three cases; and, second, as to the amount of the expenses which Henderson & Shields were entitled to charge against these plaintiffs.

To this offer defendant objected on the ground that if plaintiffs were making an offer to prove an account stated they have not pleaded anything of the kind, and, also, because it was incompetent, irrelevant and immaterial, and because the proof offered is insufficient to meet the ruling of the court.

The referee sustained the objection on the ground that it already appeared from the evidence introduced by the plaintiffs that the contract on which they are seeking to maintain their action is tainted with the illegality of the other contracts offered in evidence. To this ruling the plaintiffs duly excepted.

There was no other evidence introduced or offered by plaintiffs or defendant, and both parties thereupon submitted the cause to the referee for decision.

The referee filed his report, recommending the judgment in favor of the defendant on the cause of action stated in the petition, and in favor of the plaintiffs on the causes of action or counterclaims stated in the answer, to which report both plaintiffs and defend-

ant in due time filed their exceptions. The court overruled all of said exceptions, and rendered judgments against the plaintiffs and defendant, in accordance to the recommendations of the referee. Then, in due time, both the plaintiffs and defendant filed their motions for new trial, which were overruled by the court, and both parties to the suit duly excepted, and bring this case here on their joint appeal.

FIRST.

I. Plaintiffs contend that the referee and trial court erred in excluding proper evidence offered by them and in finding for the defendant upon the ground that the contract sued on, and set out in the petition, was champertous, and as a basis for this contention state that the defendant did not plead champerty and for that reason it was not a proper defense in this case.

The statute provides that the answer of the defendant shall contain, first, a special denial of each material allegation of the petition controverted by the defendant . . .; second, a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. [R. S. 1899, sec. 604.]

When new matter is relied upon in defense or in evidence, it must be set up in the answer. Under the old system, by pleading the general issue, everything was open to proof which went to show a valid defense. But the Practice Act, which has substituted an answer for the general issue, and requires a statement of any new matter constituting a defense, in addition to a special denial of the material allegations of the petition intended to be controverted, has worked a complete and total change in the principles of pleadings. The defendant, by merely answering the allegations in the plaintiff's petition, can try only such questions of

fact as are necessary to sustain the plaintiff's case. If he intends to rely upon new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantial fact intended to be so relied on. It follows that whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it up according to the statute, in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial. [Northrup v. Mississippi Valley Ins. Co., 47 Mo. 443.]

This court, in the case of Musser v. Adler, 86 Mo. l. c. 449, in discussing this question, said: "The character of the defense thus interposed at the close of the trial by prayers for instructions, was to admit that the services were rendered, but to avoid a recovery on the ground that they were illegal and contrary to public policy. Such a defense should be pleaded, and an intelligent issue made thereon. Here it is very clear that the question was raised incidentally, and that, too, at the close of the trial. It is not enough that evidence may appear tending to establish facts which, if pleaded, would defeat a recovery. The general denial puts in issue the facts pleaded in the petition, *not the liability*. The facts, from which the law draws the conclusion of non-liability, must be pleaded in the answer when they are not stated in the petition." This same case says: "This defense, so far as pleading is concerned, is not unlike that of champerty, gaming, usury and the like."

Therefore, it follows that the referee and trial court erred in permitting defendant to interpose the defense of champerty, when it was not set forth in the petition or answer. [Moore v. Ringo, 82 Mo. 473.]

The defendant does not seriously controvert the correctness of the above rule, but seeks to escape the

effects thereof by invoking another equally well established rule, which declares that when the contract is offered in evidence and its immorality and illegality appear on its face, a recovery should be denied even though the answer is a general denial. [McDearmott v. Sedgwick, 140 Mo. 172.]

The rule last stated does not apply to the facts of this case, because the contract between the plaintiffs and defendant provides that P. F. Kelerher & Co. shall pay one-half of any and all reasonable expenses or sums of money that may be *necessary and proper* for them to expend to insure the successful prosecution of the suits. There are many necessary and proper expenses an attorney may contract to pay in connection with the prosecution of a law suit. Even "relatives and friends of the party may often with great propriety interfere, and not only advise litigation, but also furnish the means to carry it on." [Euneau v. Rieger; 105 Mo. l. c. 681.]

In the face of the express terms of the contract, we cannot say the plaintiffs agreed to pay any part of the costs of the suit which might be instituted by Henderson & Shields against Knox county. Said contract on its face is not champertous. But the defendant contends that even though that be true, yet as the contract sued on refers to the contract between Henderson & Shields and the bondholders and provides that the suits are to be instituted and prosecuted according to the terms of the last-mentioned contract, they should be read together, as one entire contract, as if the latter had been literally copied into the former. For the argument's sake concede that to be true, which we believe correct, in construing the contract then we have one contract which contains two provisions regarding the payment of the costs and expenses of the contemplated litigation. One states that the plaintiffs

shall pay one-half of any and all *reasonable* expenses or sums of money that may be *necessary and proper* for them to expend to insure the successful prosecution of said suits, and the other that in case of loss of any such suit, Henderson & Shields obligated and bound themselves to pay *all costs of whatever nature*. If it was the intention of the parties that Kelerher & Co. and Henderson & Shields should each pay one-half of *all costs of whatever nature*, which might accrue in the prosecution of the suits, why did the same contract specifically state that Kelerher & Co. should pay one-half of all *reasonable* expenses or sums of money that might be *necessary and proper*?

It is a well-settled rule that, in construing a contract, if possible it should be construed so as to give all of its words and provisions full force and effect. Applying this rule to the facts of this case, it seems clear to us that it was the intention of all parties to the contract that Kelerher & Co. were to pay one-half of all legitimate expenses Henderson & Shields might lawfully pay or incur. If Henderson & Shields went further and contracted with the bondholders to pay *all costs of whatever nature*, which might be incurred in the prosecution of the suits, that is their fault, and should not by construction or implication be visited upon the plaintiffs in the face of their express contract to pay one-half of all *proper and reasonable* expenses. We are clearly of the opinion that the mere reference made by the contract sued on to the contract of Henderson & Shields did not have the legal effect of obligating Kelerher & Co. to pay any of the costs of the litigation. Even though the law of champerty was not in force in this State, it could not be seriously contended that Kelerher & Co. would in any manner be bound by the contracts in evidence to the bondholders to pay any costs which might have accrued in said litigation.

All their rights, duties and obligations were fully stated in the contract sued on. The reference to the other contract and receipt was made simply for the purpose of furnishing written evidence of the amount of the bonds and coupons deposited by the bondholders with Kelerher & Co., and to show that the bondholders had accepted the Henderson & Shields proposition. For this reason it was not absolutely necessary for plaintiffs to plead the contract with the bondholders, because it is more in the nature of evidence in so far as Kelerher & Co. are concerned than a contract. Under the facts of this case we believe it would have been proper to have pleaded it, yet we do not think it necessary to do so.

II. Counsel for plaintiffs next contends that the law of champerty does not exist in this State. We are unable to concur with the learned counsel upon that proposition. [Duke v. Harper, 66 Mo. 51.]

III. Counsel for defendant in his oral argument before this court contended that even though the contract sued on was not champertous, yet as it obligated defendant to pay fees which were earned and collected under and in pursuance of a contract which was clearly champertous, the courts should not lend their aid to the enforcement of that obligation. To that proposition we cannot assent. In order to reach that conclusion we would be compelled to hold that the fees so collected are tainted with champerty and illegality. The law does not impress upon the subject-matter of the contract its stamp of condemnation, but upon the contract itself. Unless the plaintiffs' contract, by which they seek to enforce their right, is infected with champerty, we see no reason why this suit may not be maintained, though such a contract exists between the defendant and the bondholders. It is time enough to turn a party out of court when he asks the aid of a

court to enforce such a contract. [Euneau v. Rieger, 105 Mo. 682; Roselle v. Beckemeir, 134 Mo. 380.]

The St. Louis Court of Appeals has held that the assignee of a promissory note could sue the maker and recover thereon, even though the contract of assignment was champertous. While this may be carrying the rule a little far, yet it shows to what great length the courts will go in order to protect the rights of the parties. [Bick v. Overfelt, 88 Mo. App. 140.]

The fact that certain collateral portions of the contract or transaction which is before the court is tainted with illegality will not defeat a recovery upon the other provisions of the contract, which in themselves give a complete cause of action, without the assistance of the infected portions. [Vette v. Geist, 155 Mo. 27.]

SECOND.

I. We will now consider the defendant's appeal.

The answer set up several affirmative defenses and counterclaims. Under our code such defenses and counterclaims stand precisely upon the same footing as the petition does. [R. S. 1899, sec. 4499.]

When there is no evidence introduced, the proper practice is to dismiss the proceedings. [Clowser v. Noland, 72 Mo. App. 217; Nordmanser v. Hitchcock, 40 Mo. 179; Wright v. Salisbury, 46 Mo. 26.]

II. The defendant also contends that there was not sufficient proof of the identification and execution of the contracts read in evidence. We have carefully gone over the evidence upon these points and are satisfied there was sufficient evidence for the jury's consideration.

III. Defendant also makes the point that the appeal of the plaintiffs should be dismissed because the

abstract of their record filed in this court is fatally defective. After a careful consideration of this point we find that there is no substantial merit in it.

For the errors hereinbefore stated, the judgment against the plaintiffs, and the judgment against the defendant, are reversed and remanded.

All concur, except *Lamm, J.*, who dissents.

IN BANC.

PER CURIAM.—Upon a rehearing of this cause by the Court in Banc, the opinion of Woodson, J., in Division No. 1, is adopted, and the judgment for plaintiffs and the judgment for defendant are reversed and remanded for new trial.

THE STATE v. J. L. SWAGERTY, Appellant.

Division Two, May 14, 1907.

1. **AUTOMOBILES: Rights on Highway.** Automobiles, operated and propelled in a manner not incompatible with the safety of the travelling public, have equal rights with other vehicles upon the public highways, subject to such rules and regulations as are prescribed by law.
2. **CONSTITUTIONAL LAW: Special Legislation.** While an act which refers to particular persons or things of a class is a special law, when the conditions reasonably justify the distinguishing of a class, and the act affects equally all who come within that class, such act is not within the constitutional inhibition against the enactment of special legislation.
3. ———: ———: **Automobile Act of 1903.** The Automobile Act of 1903, regulating the operation and speed of automobiles on the public streets, roads and highways, is not unconstitutional as special legislation merely because it does not apply to all vehicles using the public highways. It applies to and affects alike all persons, corporations, etc., engaged in operating automobiles, and it is, therefore, a general and not a special law.

4. **AUTOMOBILE ACT: Police Power.** The Automobile Act of 1903 is a police regulation, and its enactment was clearly within the power of the Legislature.
5. ———: **Independent Sections: Speed.** In a prosecution for a violation of section 2 of the Automobile Act of 1903, prohibiting the running of automobiles at a greater rate of speed than nine miles per hour, the validity of section 4 of said act, requiring operators of automobiles to obtain licenses, is not involved.
6. ———: **Speed Limit: Reasonableness.** The courts have nothing to do with the reasonableness or unreasonableness of an act of the Legislature which it was within its power to enact, and this court will not declare that a speed limit of nine miles per hour for automobiles is unreasonable.

Appeal from St. Louis County Circuit Court.—*Hon. Jno. W. McElhinney*, Judge.

AFFIRMED.

R. H. Stevens and *Kehr & Tittmann* for appellant.

(1) The general purpose of streets and highways is that of travel, either on foot by a pedestrian or in a vehicle propelled by power. The use to which the public thoroughfares may be put comprehends all modern means of conveyance. The motor vehicle has an equal right with other vehicles in common use, to occupy and use the public highways and streets. *Indiana Springs Co. v. Brown*, 74 N. E. 615; *Macomber v. Nichols*, 34 Mich. 217; *Moses v. Railroad*, 21 Ill. 515; *Upton v. Windham*, 75 Conn. 288; *Christie v. Elliott*, 216 Ill. 31; *Shinkle v. McCullough*, 116 Ky. 965; *Chicago v. Banker*, 112 Ill. App. 94; *Thompson v. Dodge*, 58 Minn. 555; *Holland v. Bartsch*, 120 Ind. 46. (2) Such being the law, and it having been decided in this State that the right and power to license, tax and regulate the use of vehicles upon the public roads or highways is solely based upon the common law maxim "that those who mainly wear out

the streets should mainly pay for keeping them in repair and that there should be such graduated scales that the kind of carriage which most wears out the streets should pay most and those which are less destructive, should pay less" (City v. Green, 7 Mo. App. 477, 70 Mo. 562; Kansas City v. Richardson, 90 Mo. App. 458), the Automobile Act of 1903 is a special law, and, therefore, violates section 53, article 4 of the Constitution of Missouri, which prohibits the enactment of a special law where a general law may be made applicable and which makes the question whether a general law could be made applicable a judicial one. State ex rel. v. Herman, 75 Mo. 346; State ex rel. v. Tolle, 71 Mo. 650; Sams v. Railroad, 174 Mo. 53; State v. Graneman, 132 Mo. 326. (3) The act violates the 14th amendment to the Constitution of the United States. Every person in the United States is entitled to the equal protection of the laws. That amendment is a guaranty of protection against State action. Virginia v. Rives, 100 U. S., 313; U. S. v. Cruikshank, 92 U. S. 542; Ex parte Virginia, 100 U. S. 339; Railroad Tax Cases, 13 Fed. 722.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

The Automobile Law is not unconstitutional, but is a reasonable exercise of the police power of the State. When such dangerous machines are allowed the use of our public highways, it is certainly right as well as reasonable to require that those in charge of them shall operate them at a reasonable rate of speed. In addition to the dangers attendant upon the use of them, such as collisions with other vehicles and the injury to pedestrians, automobiles are calculated to frighten horses and mules. It is a fact well known to all that our domestic animals do not frighten as readily at a bicycle, steam roller, automobile or threshing ma-

chine that is moving slowly as at one that is moving fast. Hence, for the safety of pedestrians as well as those riding and driving, this law was enacted. *Christy v. Elliott*, 216 Ill. 39; *McIntyre v. Orner*, 76 N. E. 752; *Shinkle v. McCullough*, 77 S. W. 197; *Gifford v. Jennings*, 190 Mass. 154; *Com. v. Sherman*, 78 N. E. 98; *Eichmann v. Buchheit*, 107 N. W. 325; *In re Berry*, 147 Cal. 523; *Radnor Twp. v. Bell*, 27 Pa. Sup. Ct.; *Crittenden v. Columbus*, 26 O. C. C. 531; *People v. Ellis*, 88 N. Y. App. Div. 471.

BURGESS, J.—On the 29th day of October, 1905, there was filed by the prosecuting attorney of St. Louis county, before R. F. Stevens, a justice of the peace of said county, an information charging that defendant J. L. Swagerty did wilfully and unlawfully, at said county, on said 29th day of October, 1905, operate and run a certain automobile, propelled by steam, gasoline, electricity or other motive power, at a greater rate of speed than nine miles per hour, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

Thereafter, on November 16, 1905, said justice heard said cause, and found the defendant guilty, and assessed his punishment at a fine of one hundred dollars and costs. Defendant appealed from this judgment to the circuit court of St. Louis county, where, on the 23rd day of May, 1906, the cause was again tried by the court, a jury being waived, and the defendant again convicted, and his punishment fixed at a fine of one hundred dollars and costs. In due time defendant filed motions for a new trial and in arrest, which were overruled, and defendant appealed to this court.

The evidence showed very conclusively that on Sunday, the 29th day of October, 1905, the defendant, on the Clayton road, one of the public highways of St. Louis county, operated an automobile at a speed of

twenty miles per hour, and that the automobile was propelled by gasoline. The State asked for no declarations of law. The defendant asked the court to declare the law to be that the act in question was unconstitutional and void, which the court refused to do, and the defendant duly excepted.

This prosecution is based upon the Act of 1903, entitled, "An Act regulating the operation and speed of automobiles on the public streets, roads and highways of this State, fixing the amount of license, and prescribing a penalty for violating same," approved March 23, 1903. It is as follows:

"Section 1. Every person, corporation, company or co-partnership engaged in operating any automobile by steam, gasoline or electricity or other motive power upon any of the public streets, roads or highways of this State, shall keep a vigilant watch for vehicles, carriages or wagons drawn by animals, and especially vehicles, carriages or wagons driven by women or children, and shall when approaching any such vehicle, carriage or wagon so drawn by animal or animals, stop such automobile for such a time as to enable such person in charge of any such vehicle, carriage or wagon to pass, or if going in the same direction, shall before attempting to pass give said driver or person in charge of any such vehicle, carriage or wagon drawn by animal or animals sufficient notice of his or their intention to pass, by the sounding of a bell or whistle, and if necessary to prevent the frightening of such animal or animals bring said automobile to a stop in order to give such driver or person an opportunity to alight from such vehicle, carriage or wagon.

"Section 2. All persons, corporation, company or co-partnership engaged in operating any automobile as aforesaid, shall, when required by the driver or person in charge of any vehicle, carriage or wagon drawn by any animal or animals, give the right of way to such

driver of such vehicle, carriage or wagon and shall not run such automobile at a greater rate of speed than nine miles per hour.

“Section 3. All automobiles operated or run upon any of the public streets, roads or highways of any city or county in this State shall bear a number corresponding to the number of the license, placed at a conspicuous place; and if run or operated in the night, shall have two lighted lamps on the front part of said automobile, and on said lamps shall be painted in legible figures, at least three inches long, the number thereof.

“Section 4. Every person, corporation, company or co-partnership, desiring to operate any automobile propelled by steam, gasoline or electricity or any other motive power, shall obtain a license from the license commissioner, if in a city having such commissioner, or if desired to operate same in any county outside the corporate limits of any such city or any of the public highways, streets or roads of this State, shall obtain a license from the county clerk of such county authorizing the operating of such automobile, and shall pay to the license commissioner, if in a city having such commissioner, or if in any county to the county clerk of such county, the sum of two dollars per annum for each automobile, so operated and run on the streets, roads and highways, which said sum shall be paid into and become a part of the general road fund.

“Section 5. Any person, corporation, company or co-partnership violating any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor and punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail not less than thirty days nor more than six months or by both such fine and imprisonment.” [Laws 1903, p. 162.]

Automobiles, operated and propelled in a manner

not incompatible with the safety of the traveling public, have equal rights with other vehicles upon the public highway, subject to such rules and regulations as are prescribed by law.

While it is conceded by defendant that the right to license or tax vehicles or the use of vehicles on the public streets, and to regulate such use, is acknowledged by the courts of this State (*St. Louis v. Green*, 7 Mo. App. 468, 70 Mo. 562; *Kansas City v. Richardson*, 90 Mo. App. 450), it is insisted that an analysis of those cases shows that the legislative acts construed applied to all vehicles using the streets, and demonstrates that when the reason of the rule on which these decisions are based is considered, the act in question is special legislation, and, therefore, unconstitutional and void.

There can be no question but that an act which relates to persons or things as a class is a general law, while an act which refers to particular persons or things of a class is a special law. [*State ex rel. Lionberger v. Tolle*, 71 Mo. 650.] It is well settled, however, in this State that, when the conditions reasonably justify the distinguishing of a class, and the law affects equally all who come within that class, such law is not within the constitutional inhibition. [*State v. Loomis*, 115 Mo. 307; *State ex rel. v. Miller*, 100 Mo. 439; *State v. Granneman*, 132 Mo. 326; *State ex inf. v. Washburn*, 167 Mo. 680; *Ex parte Loving*, 178 Mo. 194.]

The principal objection urged against the act is that it is a special law because it legislates only upon automobiles, and does not attempt to legislate upon all vehicles using the public highways. We are unable to concur with the defendant in this view. The act applies to and affects alike all members of the same class; that is, every person, corporation, company or co-partnership engaged in operating any automobile by steam, gasoline, electricity or other motive power, up-

on any of the public roads or highways of this State. It does not refer to particular persons or things of a class, and is, therefore, a general and not a special law. The act is a police regulation, and its passage was clearly within the power of the Legislature. It is the province of the Legislature to exercise the police power whenever the public health, comfort or safety seems to require it. In passing upon the constitutionality of a similar act passed by the Legislature of Illinois, the Supreme Court of that State, in *Christy v. Elliott*, 216 Ill. l. c. 40, said:

“The act in question was designed to secure the safety of travelers upon the public highway. It is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape and form, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless vehicle a source of danger to persons traveling upon the highway in vehicles drawn by horses. Such laws as the act here in question have never been regarded as class legislation, simply because they affect one class and not another, inasmuch as they affect all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis. ‘If these laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the Legislature must judge.’ [Cooley’s Const. Lim. (6 Ed.), pp. 479-481.] In *Barbier v. Connolly*, 113 U. S. 32, the Supreme Court of the United States said: ‘Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated,

is not within the amendment,' which amendment referred to by the court is the fourteenth amendment to the Constitution of the United States, which provides that 'no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.'

" 'Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition of business of such class.' [Allen v. Pioneer Press Co., 40 Minn. 120.] In Railroad v. Beckwith, 129 U. S. 29, it was said: 'The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. . . . The discriminations which are open to objection . . . are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law.' The statute in controversy in the case at bar certainly applies to all drivers of automobiles without distinction, and is, therefore, general as to that class, and, for the reason that such horseless vehicles constitute a source of danger to travelers upon the highway, it cannot be said that the classification is not a reasonable one. . . . In Sanitary District v. Bernstein, 175 Ill. 215, this court held that discrimination between different classes of litigants, which was merely arbitrary in its nature, is a denial of the right of litigants to equal protection of the law, but that, if there is a reasonable ground of distinction, the Legislature has discretion to impose reasonable conditions or restrictions, which it

deems in furtherance of justice. In *Lasher v. People*, 183 Ill. 226, it was said by this court: 'The Legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference.' In *Railroad v. Beckwith*, supra, the Supreme Court of the United States said: 'When the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise.' It is certainly true that the business of the man who operates and propels an automobile along the public highway, called a chauffeur, is such a business as is above alluded to. It is attended with danger and requires a degree of scientific knowledge upon which others must rely. These horseless vehicles are certainly capable of being propelled at a greater rate of speed than any ordinary vehicles known to the traveling public prior to their invention, and if they may travel at any rate of speed of which they are capable, persons injured would have no remedy, except such negligence as the common law gives a remedy for."

This prosecution is for the violation of section two of said act, which prohibits the running of automobiles at a greater rate of speed than nine miles an hour upon any public road or highway in this State, and has nothing whatever to do with section four of said act, which requires every person, corporation, company or co-partnership, desiring to operate any automobile propelled by steam, gasoline or electricity, or any other motive power, to obtain a license from the proper authority for that purpose, and to pay a license fee of two dollars therefor. The validity of section two of the act does not depend upon the validity of section four. *St. Louis v. Green*, 7 Mo. App. 468, and *Kansas City v.*

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Richardson, 90 Mo. App. 450, were both actions against the operators of vehicles in said respective cities, in disregard of ordinances of said cities which required all such persons to pay a license tax for the privilege of so doing, and are not in point in this case. Numerous criticisms are passed upon the different sections of the act, none of which, however, have any bearing in this case excepting such as have reference to that provision of section two which limits the rate of speed at which automobiles may be run to nine miles per hour. It is claimed by defendant that this speed limit is unreasonable because it applies only to automobiles and not to any other kind of vehicle, and because a limit of nine miles an hour is a rate of speed less than that at which vehicles as well as persons on horseback frequently go.

It is of common knowledge that automobiles are frequently run at a very high rate of speed on the public highways, and because of this, and their peculiar shape, appearance and noise, they frequently frighten horses and cause them to become unmanageable, and do much injury to both persons and property. To prevent such occurrences the act in question was passed. With the reasonableness or unreasonableness of the act this court has nothing to do. That was for the determination of the Legislature, whose power as a law-making body is prescribed and limited only by the State and Federal Constitutions. In *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, Judge LUMPKIN, in a very able and exhaustive opinion in which he discussed the authority of the Supreme Court to declare invalid an act of the Legislature because of unreasonableness, said: "I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the Legislature, so long as it acts within the pale of its constitutional competency." The province of the court is to in-

interpret and obey the mandates of the supreme power of the State, however absurd and unreasonable they may appear."

The law in question is plain, and was within the power of the Legislature to enact. It is as binding upon the courts as upon the citizen. If the law is harsh, the remedy is by repeal or amendment.

Finding no reversible error in the record, the judgment is affirmed. All concur.

THE STATE v. JAMES P. EDWARDS, Appellant.

Division Two, May 14, 1907.

1. **INSTRUCTION: Provoking Difficulty: No Evidence.** The giving of an instruction on the subject of provoking the difficulty, where, as in this case, there is no evidence upon which to base it, is reversible error.
2. ———: **On Lower Grade of Offense: Erroneous.** Although a defendant cannot complain of a proper instruction covering a lower grade of offense than that of which the evidence shows him to be guilty, he has the right to challenge an instruction which erroneously declares the law as to such offense.
3. ———: **Threats: Provocation: Reducing Grade of Crime.** The admission of threats by deceased against defendant is confined to that class of cases in which the evidence tends to show some act or conduct on the part of the deceased which threatens immediate injury to defendant, or which tends to prove that the homicide was committed in self-defense. And it was error to instruct the jury that such threats constituted an element of provocation which would reduce the homicide from murder to manslaughter.
4. ———: **On Self-Defense: Argumentative.** Where the court has, by its instructions, fully declared the law of self-defense, it is not error to refuse an instruction, requested by defendant, which is argumentative and theoretical, rather than a plain declaration of law.

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5. **THREATS: Uncommunicated: For What Purpose Admitted.** Uncommunicated threats made by deceased are admissible, not for the purpose of showing apprehension of danger, but as throwing light upon the acts and conduct of deceased at the time of the fatal difficulty, and as tending to show who was the aggressor.
6. **EVIDENCE: Cross-Examination.** It was not error to ask defendant's son, on cross-examination, whether he did not say in the presence of another party, after having heard of the killing, "Well, it has happened." Great latitude should be allowed in the cross-examination of such a witness.
7. —: **Purchasing Pistols: Immaterial: Impeachment.** Evidence as to the purchase, by defendant's son, of two pistols several days before the homicide, was irrelevant and immaterial and should not have been admitted, there being nothing to connect it with the homicide, and it being conceded that the killing was done with a shotgun. And the evidence being immaterial, the witness was not subject to impeachment.
8. —: **Expert.** Testimony of an expert should be admitted only after a reasonably satisfactory showing that he is qualified to testify as an expert.

Appeal from Audrain Circuit Court.—*Hon. Jas. D. Barnett, Judge.*

REVERSED AND REMANDED.

P. H. Cullen, Orlando Hitt and E. W. Hinton for appellant.

(1) The instruction of the court on the subject of provoking the difficulty is erroneous. There was no evidence on which to base it. *State v. Walker*, 196 Mo. 73; *State v. Packwood*, 26 Mo. 340; *State v. Bailey*, 57 Mo. 131; *State v. Chambers*, 87 Mo. 406; *State v. Herrill*, 97 Mo. 111; *State v. Johnson*, 111 Mo. 584; *State v. Little*, 67 Mo. 624; *State v. Tice*, 90 Mo. 112; *State v. Sturgis*, 48 Mo. App. 263; *State v. Wilson*, 39 Mo. App. 186; *State v. Brady*, 87 Mo. 142. (2) The instruction as to manslaughter is erroneous and misleading and without evidence to support it. Previous

threats do not constitute lawful provocation within the meaning of the law. The rule is well nigh universal that facts which might show passion are not admissible when a period of time has elapsed between defendant's first knowledge of them and his action, sufficient for his passion to cool. *State v. Grayor*, 89 Mo. 600; *State v. Herrell*, 97 Mo. 105; *State v. Baker*, 30 La. Ann. 1134; *Compton v. State*, 117 Ala. 56; *State v. Lawry*, 4 Nev. 161. Threats, assaults, insulting epithets or charges made at the time of the difficulty are admissible on the issue of provocation but if made previous to the killing such matters are rigidly excluded on the issue of provocation. *State v. Brown*, 181 Mo. 192; *State v. Jackson*, 17 Mo. 544; *State v. Wood*, 124 Mo. 412; *Sanchez v. People*, 22 N. Y. 147. (3) The court erred in declining to instruct that proof of a wounding in the back or side was not proof of such physical fact as destroyed self-defense. (4) The court's endorsement of the State's contention that uncommunicated threats by deceased are immaterial was error. (5) The ruling permitting defendant's witnesses to be contradicted on collateral issues and opinions was erroneous.

Herbert S. Hadley, Attorney-General, *N. T. Gentry*, Assistant Attorney-General, and *John D. Orear* for the State.

(1) The instruction, given by the court, on the subject of manslaughter in the fourth degree, was a proper one. The evidence showed that a threat, made by the deceased, was communicated to the defendant an hour or two before the killing. That just prior to the shooting, the deceased jumped violently from his chair, telling the defendant that he should not live to enjoy deceased's money; and that the defendant, by this sudden action, was excited. If these facts were true, and they were given in evidence by defendant, they

justified the manslaughter instruction. Even if they did not justify such an instruction, the error was one in favor of the defendant, and one for which he cannot complain. This instruction permitted the jury to convict the defendant of a lesser crime than the one he was, according to the evidence, guilty of; hence the error, if error it was, was in his favor. *State v. Billings*, 140 Mo. 193; *State v. Todd*, 194 Mo. 377; *State v. McMullin*, 170 Mo. 609; *State v. Nelson*, 88 Mo. 126; *State v. Bulling*, 105 Mo. 204. (2) No error was committed in allowing the State to cross-examine defendant's son on the statement that he made to the witnesses Lincoln Cleveland and Ira Mayes; nor in allowing the State to contradict that statement by proving that, immediately after hearing of the shooting, the son of defendant said, "It has happened." (3) No error was committed in refusing defendant's instruction on the subject of shooting the deceased in the back. Defendant testified that the deceased got up, ran his hand in his pocket and made a motion like he was going to assault the defendant, and started towards him. In the cross-examination of the physicians, who testified for the State, and in the introduction of Dr. Wallace's evidence, defendant was trying to convince the jury that deceased was shot in front, and shot at the time he was starting to attack the defendant. Defendant also introduced evidence tending to show that the deceased, after the shooting, fell on his back on the floor. Hence, the defendant was not entitled to an instruction the opposite of what he himself testified to, and what all of his evidence tended to prove. A party's position must be consistent; he cannot introduce evidence on one theory and then be entitled to have instructions on another. *State v. Valle*, 196 Mo. 29; *State v. Bailey*, 190 Mo. 295; *State v. Lewis*, 118 Mo. 83; *State v. Gartrell*, 171 Mo. 522.

FOX, P. J.—This cause is here by appeal on the part of the defendant from a judgment of the circuit court of Audrain county convicting him of manslaughter in the fourth degree. On the 27th day of March, 1906, the prosecuting attorney of Audrain county filed an information, duly verified, charging the defendant with murder in the first degree. The date of the homicide charged was March 22, 1906; the name of the party charged to have been killed was John Oldham, and the weapon used was a shotgun. At the June term, 1906, of the Audrain Circuit Court the defendant was put upon his trial upon the charge contained in the information. We shall not undertake to give in detail all of the testimony introduced upon the trial; it will suffice to give the tendency of the testimony to establish certain facts involved in the prosecution.

The State's evidence tended to prove that the defendant and the deceased were engaged in the operation of a coal mine on defendant's farm near Thompson, in Audrain county. A written contract had therefore been entered into between them, by the terms of which the deceased agreed to pay certain sums at stated times as royalty, and the deceased was to have the exclusive operation of the mine. In addition to the operation of the mine the deceased and his family were given the right to and did occupy a dwelling house and a small piece of ground belonging to the defendant near said mine. Some time prior to the 22nd of March, 1906, there were differences between them as to the amount due and as to the way the mine was being operated. Accordingly, defendant attempted to terminate the lease and instructed the deceased to vacate the mine and also the dwelling house. Deceased and his family moved out of the house over to the Northcutt place and moved some of his tools from the mine a few days prior to the date of the homicide. On the morning of the homicide the deceased went to the mine for

the purpose of getting some tools and a telephone box, and also for the purpose of moving some of his boxes out of a little stable in order that the defendant might put some hay in the stable. Mr. Oldham, the deceased, claimed that the defendant was still owing him for certain work that he had done on the dwelling and barn and mine and also for an expensive piece of machinery that he purchased and placed in the mine. A short time before noon Mr. Oldham left the mine going in the direction of the defendant's house, the defendant having gone to the house about one hour before. There was no witness present at the time of the shooting with the exception of the defendant himself. As to what happened at the time of the shooting the State introduced in evidence a short statement signed by the defendant, made by him before the coroner, the substance of which was that the deceased came into the defendant's bedroom, commenced talking to the defendant in a threatening and angry manner, thrust his hand into his overcoat pocket as though in the act of drawing some weapon, and that the defendant shot twice, using a double-barreled shot gun. The coroner, Dr. P. E. Coil, who resided at Mexico, Missouri, learned of the shooting and went at once in company with the prosecuting attorney and the sheriff to the home of the defendant, reaching there late in the afternoon of that day. The coroner testified that he found the body of deceased in the bedroom of the defendant; that deceased was lying on his back with his head close to a stove, his feet being about the center of the room. Near his head was the foot-rest on the stove, which was broken, the break appearing to be recent. In respect to the nature and character of the wounds inflicted upon the deceased, the testimony as introduced by the State also tended to show that there were two wounds, one on the right side of the back and the other on the left side of the back, the wounds ranging up,

the loads scattering and some of the bullets going out in front. It was claimed that one of the bullets was deflected and some were still found in the body of the deceased. The deceased had on an overcoat, undercoat, shirt, undershirt, pants and overalls. The testimony tended to show that after the killing he had no weapon whatever in any of his pockets, but a small pocket knife which was found in his pants pocket under his overalls. In his right hand overcoat pocket was found a telephone receiver.

The testimony of the sheriff was substantially that he examined the room in which the deceased's body was found but that he could find no bullets and that while the deceased's clothing was very bloody he found no blood on the carpet. There was another witness who testified substantially that the deceased, before leaving the mine, got his wood rasp, which he placed in his outside overcoat pocket. This rasp was about an inch and a half wide and about eighteen inches long, and it was found by witness Ridgeway about the premises of the defendant after the snow melted, some three or four days after the killing. It was found about five or six feet east of the porch, which was the porch opening into the bedroom where the body of the deceased was afterwards found.

On behalf of the defendant the evidence tended to show that he had settled with the deceased in full and that deceased was in debt to him and in debt to his miners and could not continue to run the mine; but in order to be liberal toward the deceased the defendant agreed to pay him \$50 more, which the deceased refused to accept and insisted on having still more. Numerous and divers threats by the deceased to do the defendant some great personal injury were also shown. These threats were made by the deceased and were to the effect that he was not satisfied with the settlement; that he had several hundred dollars in the

coal mine; that he was going to have it and that defendant could not live unless he paid the deceased. These threats were communicated to the defendant, the one made to the defendant's son being communicated within an hour or two of the final difficulty. The defendant's evidence further tended to show that after the deceased vacated the mine the defendant's son took possession and began running it, and that the deceased came down to the mine on the morning of the difficulty, and was looking after some of his property remaining at the mine and in the stable. The defendant and his father-in-law came down to the barn with a load of hay, which was unloaded in the barn, at which time they say the deceased refused to speak to the defendant. Before going to the barn the defendant's son warned the defendant that the deceased had threatened him and that he had better not go down while the deceased was there. Immediately after unloading the hay the defendant went back to the house and went into his bedroom and lay down on the lounge. In the course of a half an hour or an hour the deceased came up to the defendant's house, carrying a telephone box, met the defendants' wife and asked if he might leave the box there. She replied that he could and deceased set the box down and then asked for the defendant. Mrs. Edwards told him that the defendant had hurt his back and was lying down on the bed in his room, and invited the deceased to walk in. The deceased went in, got into a controversy with the defendant over the amount due him, and the defendant offered to pay him \$100, but the deceased declined to accept it, saying that the defendant should not live, and running his hand into his overcoat pocket. As he thrust his hand into his pocket the deceased rose and either started toward the defendant or made a motion as if he was going to start, and then the defendant, who was sitting at his desk, grabbed his

double-barreled shotgun and fired twice at the deceased. The defendant further testified that he thought he shot the deceased in front, but he was not sure, but that the deceased fell on his back, breaking the foot-rest on the stove. The wife of the defendant came in about that time, and also testified to the fact that the deceased was shot in this room. The father-in-law of the defendant was telephoned for and came down to defendant's house, being the first to arrive; but he did not testify at the trial; and two physicians from Centralia were present and assisted in the post-mortem examination. One of the physicians, Dr. W. A. McAllister, of Boone county, testified on behalf of the State and corroborated Drs. Toalson and Coil, who also testified on behalf of the State, that both wounds took effect in deceased's body and were shot from behind. Dr. Wallace, the defendant's family physician, gave it as his opinion that the wounds entered in the front of deceased's body, though he could not account for some of the bullets found in the body nor some of the holes which were evidently points of exit.

There was other testimony offered by the State, over the objections and exceptions of the defendant, that the defendant's son who, it seems, was to take possession of and did take possession of the mine as soon as deceased vacated same, visited Centralia the Saturday before the shooting and purchased two pistols and a round of cartridges for each one, one of which he gave to a man named Buford Wheeler, who was a partner with the son in the coal mine, and the other pistol defendant's son carried himself, and had it in his pocket on the day of the fatal difficulty.

In rebuttal the State introduced witnesses Lincoln Cleveland and Ira Mayes; they substantially testified that immediately after hearing of the killing of the deceased the defendant's son, who was a witness for the defendant, called to the men at the mine and said,

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“It has happened.” There was other testimony in rebuttal offered by the State to the effect that Buford Wheeler, who testified that he was at deceased’s house before the killing and heard deceased make threats, was not at deceased’s house at that time. The son of the deceased also substantially testified that Buford Wheeler stated to him on the day of the preliminary hearing that he never heard the deceased make any threats against the defendant.

At the close of the evidence the court instructed the jury upon murder in the first and second degrees, manslaughter in the fourth degree, and upon the right of self-defense, reasonable doubt and the credibility of witnesses, and the cause being submitted to the jury upon the evidence and instructions of the court, they returned a verdict finding the defendant guilty, as before stated, of manslaughter in the fourth degree, and assessing his punishment at two years’ imprisonment in the State penitentiary. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Judgment and sentence was pronounced and entered of record in accordance with the verdict, and from this judgment the defendant in due time and proper form prosecuted his appeal to this court.

OPINION.

The record in this cause discloses the assignment of numerous errors committed by the trial court as grounds for the reversal of this judgment. We will give to the complaints of appellant such attention as their importance requires.

I.

It is insisted by learned counsel for appellant that the instruction of the court upon the subject of provoking the difficulty was erroneous. This instruction was as follows:

“The court instructs the jury that the right of a citizen to defend himself against danger is a right which the law concedes and guarantees to all men. Therefore, the defendant may have killed John Oldham and be innocent of any offense against the law. If at the time defendant shot John Oldham he had reasonable cause to apprehend on the part of said John Oldham a design to do defendant some great personal injury, and there was reasonable cause for defendant to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger to himself, he shot said John Oldham, and at the time he did so he had reasonable cause to believe and did believe it necessary for him to shoot said John Oldham to protect himself from such apprehended danger, then and in that case the shooting was not felonious, but was justifiable and you will acquit him. It is not necessary to this defense that the danger should have been actual or real or that the danger should have been impending and immediately about to fall. All that is necessary is that defendant had reasonable cause to believe and did believe these facts. But before you acquit on the ground of self-defense you must believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause of apprehension have been established by the evidence, you are to determine, and unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit him on the ground of self-defense, even though you may believe that defendant really thought that he was in danger. On the other hand, the law does not permit a person to voluntarily seek or invite a combat or voluntarily put himself in the way of being assaulted in order that when hard pressed he may have a pretext to take the life of his assailant. The right of self-defense does not imply

the right of attack. But if he does not intentionally bring on the difficulty nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe."

In the discussion of the complaint lodged by the appellant against this instruction we must not overlook the fundamental rules as applicable to the giving of instructions either in civil or in criminal cases, that is, that it is essential in both criminal and civil cases that in order to authorize an instruction upon any particular subject involved in the cause, there should be at least some substantial evidence upon which to predicate the instruction, and it is error in either a civil or criminal cause to give an instruction without any evidence to support it. [State v. Allen, 116 Mo. l. c. 555; State v. St. John, 94 Mo. App. 229; State v. Bailey, 57 Mo. 131; State v. Chambers, 87 Mo. 406; State v. Herrell, 97 Mo. 105.]

Following the rule so clearly stated in the cases above cited, we are simply confronted with the proposition as to whether or not the facts as disclosed by the record in this cause furnish any support or basis for the giving of the instruction complained of by the appellant. We have substantially adopted the statement of what the evidence tended to prove as made by the Attorney-General and the prosecuting attorney of Audrain county representing the State in this cause, and after a careful analysis of the statement of the evidence by counsel for respondent, we are unable to find any testimony which authorized the trial court in giving that instruction. Counsel for respondent, in referring to what evidence the State introduced at the time of the shooting, say that, "the State introduced in evidence a short statement signed by the defendant, made by him before the coroner, the substance of which was that the deceased came into

the defendant's bedroom, talked in an angry manner, thrust his hand into his overcoat pocket, and that the defendant shot him twice, using a double-barreled shotgun." In addition to this the only witness who testified as to what occurred at the time of the shooting was the defendant himself, and his testimony fails to disclose that he said or did anything which was calculated to provoke a difficulty, and giving full force to all of the testimony introduced by the State or elicited from witnesses testifying for the defendant, there is an absolute failure to show any such state of facts as would authorize the court to give the instruction as heretofore indicated. While it may be true that the jury were not bound to believe the testimony as detailed by the defendant, yet the court would not be authorized to embrace this subject in its instructions to the jury, in the absence of any testimony tending to prove the facts involved in such subject, and thereby have the jury simply guess or surmise that the defendant sought the difficulty or brought it on for any unlawful purpose whatever. While it may be true that the defendant unnecessarily took the life of the deceased, yet if we are to longer regard the rules of law applicable to the trial of causes by jury, it must be held that it was error for the court to submit a question to the jury on mere conjecture and in the absence of any substantial testimony upon which to predicate such instruction.

We deem it unnecessary to pursue this subject further. We have read with a great deal of care the details of all the testimony in this cause and in view of the testimony disclosed by the record we see no escape from the conclusion that there was absolutely no testimony upon which this instruction could have been based.

That the giving of this instruction without any testimony upon which to base it was reversible error,

we only need to call attention to the uniform rulings of this court upon that subject. In *State v. Chambers*, supra, it was said by this court, touching a similar instruction to the one here complained of, that "the instruction was misleading; there being no evidence upon which to base it, it was calculated to prejudice the defendant before the jury." The *Chambers* case was approved in *State v. Herrell*, supra, and it was again held that it was error to give such an instruction without evidence.

In *State v. Walker*, 196 Mo. 1. c. 85, it was said: "The law is that one may not deliberately seek and provoke a difficulty with another with a design to kill him and then invoke the right of self-defense, but it is also the law that when there is no evidence of such seeking and provoking a difficulty in order to get an opportunity to wreak one's vengeance on another, it is error for the trial court to frit away the right of self-defense by inviting the jury to enter the field of conjecture and excuse the aggressor on such ground when there is, as in this case, no basis for such a qualification of the law of self-defense."

In the recent case of *State v. Gordon*, 191 Mo. 114, the subject embraced in the instruction now under discussion was fully considered and all of the authorities exhaustively reviewed, and this court, after reviewing all of the authorities, said: "Our conclusion is that in the light of the more recent decisions of this court since the *Partlow* case, notwithstanding there are cases which seemingly conflict with the view, it is error to instruct that a defendant in a personal altercation forfeits the right of self-defense merely because he voluntarily engages in a difficulty. The occasions on which this right is forfeited have been pointed out in the foregoing excerpts from the decision in *State v. Partlow*, 90 Mo. 608, and in cases cited. The tenth instruction as applied to the facts in this record was,

in our opinion, misleading and erroneous. It was not made applicable to the state of the testimony and should not have been given even when modified by omitting the clause as to 'voluntarily entering into the difficulty,' without fully advising the jury as to what constitutes provocation that will justify an assault and as to what is meant by 'provoking a difficulty,' or 'being free from fault.' Mere words of reproach or opprobrious epithets do not constitute such provocation as would put the defendant in any degree in the wrong if it became necessary to kill Doelling in his own defense."

II.

It is insisted by appellant that the instruction by the court as to manslaughter in the fourth degree was misleading and did not properly declare the law as to that grade of crime. The instruction complained of was as follows:

"If the jury believe from the evidence in the cause that the deceased, John Oldham, had at intervals within a week or ten days prior to the homicide threatened to take the life of defendant or to do him great bodily harm, and continued making such threats up to and on the day of the homicide, and that such threats were communicated to the defendant (prior to the homicide) and that at the time the defendant shot and killed John Oldham, the defendant was acting under a violent passion of fear and excitement caused in part by the knowledge of such threats, and suddenly aroused by reason of said Oldham having used towards defendant threatening language, and by said Oldham jumping from his chair in a threatening manner, and by reason of an apprehension on the part of the defendant that said Oldham was in the act of drawing upon him a weapon for the purpose of killing him or of inflicting on him great personal injury; yet

if you further find and believe from all the evidence that the shooting of Oldham was not necessary to the self-defense of defendant as explained in other instructions, and believe that the apprehension of defendant that said Oldham was about to draw a weapon was not a reasonable apprehension under the circumstances surrounding the homicide, and believe that the apprehension of defendant that Oldham was about to attempt to kill defendant or to do him great injury was not a reasonable apprehension under the circumstances surrounding the homicide, then you will find the defendant guilty of manslaughter in the fourth degree."

It is well settled in this State that where the defendant, if guilty at all, is guilty of a higher grade of offense than the one upon which he is convicted and upon which the court gave an instruction, he is in no position to complain of an instruction given upon such lower grade of crime, even though there was no evidence upon which to predicate it; however, it is equally well settled that, if the court undertakes to give an instruction upon a grade of offense not warranted by the testimony, the instruction must be a proper one embracing all of the essential elements of such offense, and while, if the instruction was a proper one, it may be said that the defendant would have no right to complain, yet if the court erroneously declares that if the jury find a certain state of facts which under the law would not constitute such lower grade of crime, the defendant clearly has the right to challenge the sufficiency of such instruction.

In *State v. Gordon*, *supra*, the rule as applicable to manslaughter was thus clearly stated: "At common law words of reproach, how grievous soever, were not provocation sufficient to free the party killing from the guilt of murder, nor were contemptuous or insulting actions or gestures without an assault upon the

person, nor was any trespassing against lands or goods to have the effect to reduce the guilt of killing to a grade of manslaughter; the provocation must consist of a personal violence. [1 East's Pleas of the Crown, 233; 4 Blackstone, Com., 201; State v. Wieners, 66 Mo. 13.] And the common-law rule in this respect is firmly established in this State by a long line of decisions. [State v. Starr, 38 Mo. 271; State v. Branstetter, 65 Mo. 149; State v. Hill, 69 Mo. 451; State v. Elliott, 98 Mo. 150; State v. Gartrell, 171 Mo. 516-519.]”

This instruction, measured by the rule as announced in the Gordon case, is manifestly erroneous. It will be noted that the court in the instruction now under consideration authorized the jury to predicate the arousing in defendant of a violent passion upon a state of facts which under the uniform rulings of this court has been deemed insufficient to reduce the killing from murder to manslaughter, and it is directly in conflict with the rules and authorities cited in State v. Gordon, *supra*. It will be noted that this instruction makes threats by the deceased made a week or ten days prior to the homicide as a part of the basis for the excitement and passion aroused in the defendant. Such threats were inadmissible for any such purpose, and should never be admitted simply on the question of provocation. A review of the long line of decisions in this State will demonstrate that evidence of threats by the deceased against the defendant is confined to that class of cases where the evidence tends to show some act or conduct upon the part of the deceased threatening immediate injury to the defendant or tending in some way to prove that the homicide was committed in self-defense. [State v. Brown, 63 Mo. 439; State v. Spencer, 160 Mo. 118; State v. Harrod, 102 Mo. 590.]

It is apparent that the threats introduced in evidence in the case at bar were applicable alone to the

issue of self-defense and it was error for the court to instruct the jury that such threats constituted any part of the elements of provocation which would reduce the killing from murder in the first or second degree to manslaughter in the fourth degree.

III.

It is urged by the defendant that the court committed error in refusing the following instruction requested by the defendant:

“The court instructs the jury that even though you may believe that the balls fired from defendant’s gun struck the deceased on the back or sides and ranged forward, yet if from all the evidence you believe that at the time the defendant fired the shots he believed and had reasonable grounds to believe that deceased was about to kill him or inflict great bodily injury upon him and that he shot in good faith to protect himself and ward off the impending danger, then under the law his act is justifiable and you should acquit him.”

In our opinion there was no error in the refusal of this instruction. The court in other instructions had fully declared the law of self-defense and it was the province of the jury to consider all the evidence as applicable to such defense without having their attention called specially to a theory that the deceased may have been shot in the back or on the side, and yet such fact would not deprive defendant of the right of self-defense. This instruction is suggestive of an argument along certain lines rather than a clear and plain declaration of law upon the question of self-defense. The law upon that subject was fully declared for the defendant and there was no error in the court’s refusing the instruction now under consideration.

IV.

Complaint is made by appellant that the court during the progress of the trial indorsed a theory of the State that uncommunicated threats by the deceased were immaterial. The court admitted the testimony as to uncommunicated threats, and it is only necessary to say, as this case is to be retried, that the law upon that subject is well settled that uncommunicated threats are admissible in evidence not for the purpose of showing apprehension of danger, but as throwing light upon the acts and conduct of the deceased at the time of the fatal difficulty and for the purpose of showing who was the aggressor in such difficulty.

V.

Complaint is made as to the cross-examination of the son of the defendant while down at the mine, in which he was asked the question, after having heard of the killing of Oldham, as to whether or not he did not say in the presence of Lincoln Cleveland, "Well, it has happened." We are of the opinion that there was no reversible error in this cross-examination. He was the son of the defendant and great latitude should be allowed in the cross-examination of such a witness.

VI.

It is insisted by appellant that the court committed error in admitting the testimony of the witness Mr. Canatski. This witness's testimony had reference to the purchase by the son of the defendant, James A. Edwards, of two revolvers in the town of Centralia about the 17th of March, and the witness detailed a conversation between him and young Edwards about the purchase of the pistols and the purpose of purchasing them. We are unable to see upon what theory this testimony was admitted. Our attention has not been called to anything which connects it with the

killing of Oldham by young Edwards' father. It is not claimed or pretended that the killing was done with a pistol, for it is conceded that the killing was done with a shotgun. Therefore, we cannot escape the conclusion that this testimony was entirely irrelevant and immaterial, and even though young Edwards may have denied certain statements made in respect to the purchase of the pistols, or statements made at the time of their purchase, yet the testimony being immaterial the witness was not subject to impeachment upon that class of testimony.

VII.

As to the complaint lodged against the testimony of Dr. Paul E. Coil, it is sufficient to say, as this case is to be retried, that the trial court should only admit his testimony upon a reasonably satisfactory showing that he is qualified to testify as an expert. After this showing is made as to the facts susceptible of proof by the opinion of an expert, the doctor is a competent witness and his testimony should be admitted.

We have thus indicated our views upon the main propositions disclosed by the record, which results in the conclusion that the trial court committed error in the particulars as heretofore indicated. The judgment therefore should be reversed and the cause remanded for a new trial, and it is so ordered.

All concur.

THE STATE v. I. B. LAKIN, Appellant.

Division Two, May 14, 1907.

NO BILL OF EXCEPTIONS. Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed.

Appeal from Benton Circuit Court. — *Hon. C. A. Denton*, Judge.

AFFIRMED.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

Where there is no bill of exceptions, and no error appearing in the record proper, the judgment will be affirmed. *State v. Nicholas*, 193 Mo. 214; *State v. Sparks*, 191, Mo. 162.

GANTT, J.—This is an appeal from the circuit court of Benton county. At the March term, 1905, the grand jury of Benton county returned an indictment against the defendant for a violation of section 1838, Revised Statutes 1899.

At the June term, 1905, the defendant was arraigned, pleaded not guilty, was tried and convicted, and his punishment assessed at a fine of one hundred dollars. His motion for new trial was heard and overruled and he was granted an appeal to this court. He filed no bill of exceptions, and the record proper alone is here for our consideration. The indictment is sufficient under the decisions of this court in *State v. Knock*, 142 Mo. 515; *State v. Hall*, 164 Mo. 528. The arraignment, trial and conviction are all in regular form, as are also the verdict and sentence of the court. The judgment is affirmed.

Fox, P. J., and Burgess, J., concur.

THE STATE v. CHESS CLAPPER, Appellant.

Division Two, May 14, 1907.

1. **REMARKS OF COUNSEL: Abuse of Defendant and His Counsel: Reversible Error.** The prosecuting attorney, in his closing argument to the jury, said: "The attorney for the defendant has tampered with the witnesses; you know it, and I know it, and he ought to be convicted for it; and, too, the attorney for the defendant has attempted to buffalo and bulldoze this court and myself. . . . The defendant is a scoundrel and a perjurer, and ought to be convicted." Defendant objected to the remarks at the time they were made, and requested the court to instruct the jury to disregard them in considering of their verdict, but this the court failed to do, but simply requested the prosecuting attorney to keep within the record. *Held*, reversible error.
2. ———: **Not in Motion for New Trial.** Improper remarks of counsel not called to the court's attention in the motion for new trial can not be considered on appeal.

Appeal from McDonald Circuit Court.—*Hon. F. C. Johnston*, Judge.

REVERSED AND REMANDED.

Pepper, Clay & Sheppard for appellant.

The court erred in permitting the prosecuting attorney in his closing argument to the jury to make improper remarks, and in refusing to reprimand him therefor, and in refusing to instruct the jury not to consider the said improper remarks in reaching their verdict in the case. *State v. Helm*, 92 Iowa 540; *State v. Woolard*, 111 Mo. 255; *Haynes v. Trenton*, 108 Mo. 133; *State v. Fischer*, 124 Mo. 464; *State v. Young*, 99 Mo. 683; *State v. Harvey*, 131 Mo. 338; *Long v. State*, 55 Ind. 182.

Herbert S. Hadley, Attorney-General, and *Rush C. Lake*, Assistant Attorney-General, for the State.

It appears from the bill of exceptions that the defendant objected to the remarks made by the prosecuting attorney and that "the court thereupon requested the attorney for the State to keep within the record, but wholly failed to instruct the jury, either orally or by written instructions, as requested by the attorney for the defendant." From the foregoing it is shown that the court reprimanded and rebuked the prosecuting attorney for making the remarks which defendant's attorney construed as being unwarranted by evidence. That this was a sufficient reprimand or rebuke by the court is shown by the decisions of this court in the following cases: *State v. Lee*, 66 Mo. 168; *State v. Degonia*, 69 Mo. 490; *State v. Howard*, 118 Mo. 145; *State v. Brandenburg*, 118 Mo. 187; *State v. Taylor*, 134 Mo. 158; *State v. Wright*, 141 Mo. 337; *State v. Allen*, 174 Mo. 697.

BURGESS, J.—At the January term, 1905, of the circuit court of McDonald county, the defendant was convicted of a felonious assault with intent to kill one James Turner, and his punishment fixed at two years in the penitentiary, under an information filed by the prosecuting attorney of said county charging him with the commission of said offense.

After filing timely motions for new trial and in arrest, which were overruled, defendant appealed.

The testimony shows that the quarrel which led to the shooting grew out of a drunken spree of the day before, during which, as defendant claimed, he was robbed of \$68. He accused James Turner of the theft of the money, the only apparent ground for such charge being that Turner held defendant's note for about that sum. On the day following the drunken spree, the defendant and his two brothers met Turner

and two other young men on the road, when defendant demanded of Turner the said note or the return of the money which he claimed to have lost. The evidence shows that the parties were within eight or ten feet of one another, and that Turner was sitting on a fence, holding the bridle reins of his pony in his hands, and that defendant, without warning, drew his pistol and began shooting at Turner, none of the shots taking effect.

James Turner testified that he met the defendant, and that the latter said, "What did you do with my money? You got my money." I said, "No," and he said, "I believe you got it," and I told him I didn't; and he went on talking and kept on accusing me of getting it, and then he called for the note or an order for it, or receipt or order, and I told him I would not give it to him; and I stepped over and set down on the fence, and they surrounded me. Bill got over on the east side of me and Chess on the other side, and Jerry came up in front of me; I was riding my pony, me and Jess Moyer, and come down together. I rode my pony over there, and set down on the fence, and Chess said that if I didn't give up the note he would cause me trouble, and I told him I wouldn't, and he kept on saying that over again, and wanted an order for the note, and I wouldn't give it to him, and he said, "I will cause you trouble." . . . Chess said, "We will cause you trouble if you don't give up that note; we will have a warrant taken out for you," and I said, "I won't give it up," and Jerry said, "If I was Chess, and knew he got the money," he said you would be like Chess and want him to give it up, and I said, "I didn't get it," and Chess said, "Well, I will cause you trouble," and he drew his gun out of his overcoat and pulled off his gloves, and I was sitting on the fence. He brought it over that way at me, and

I jumped off the fence, and he put his bullet through my jumper.

Being asked if defendant fired at him, he said, "Yes, sir, and I run across the road, and he shot at me again and hit my pony one shot, and he shot through my jumper, right down there, and cut through my shirt, down through my undershirt, and under there, and I run on down the road and jumped over the fence, and Chess followed me down the road."

"Q. How far did he follow you? A. Something like one hundred yards.

"Q. Did he fire any more shots than those three? A. He fired four that I know of; I didn't stop to count the shots."

The testimony of James Turner was corroborated by Homer Means, who was an eyewitness to the occurrence.

The defendant, Chess Clapper, testified as to the occurrences leading up to the shooting substantially as shown by the State, except that he stated that before he began shooting, the prosecuting witness, James Turner, made a move as if to draw a gun, and that he then opened fire, discharging four shots, none of which took effect.

The case was submitted to the jury under instructions given by the court which are not set out in the bill of exceptions, and cannot, of course, be considered on this appeal.

The defendant assigns as error the action of the court in permitting the prosecuting attorney, in his closing address to the jury, to make use of the following objectionable remarks:

"The attorney for the defendant has tampered with the witnesses; you know it, and I know it, and he ought to be convicted for it; and, too, the attorney for the defendant has attempted to buffalo and bulldoze this court and myself, just because we were new at the

State v. Clapper.

business, and thought we would not know any better.

"The defendant is a scoundrel and a perjurer, and ought to be convicted."

"Chess Clapper's reputation is not good, or else he would have put some of the people here attending court from Elkhorn township on the stand to prove his good reputation. Gentlemen, he is low down and ought to be convicted."

To these remarks defendant called the attention of the court in his motion for new trial, one of his grounds for new trial being that, "The prosecuting attorney in his closing remarks said that the attorney for the defendant had tampered with the witnesses and had buffaloeed and bulldozed the court, and that the defendant was a scoundrel and a perjurer and ought to be convicted."

Other objectionable remarks of the prosecuting attorney are complained of in defendant's brief, but as the attention of the court was not called thereto in the motion for new trial, they cannot be noticed upon this appeal. [State v. Miles, 199 Mo. 530.]

While the record discloses that defendant objected to the quoted remarks of the prosecuting attorney at the time they were made, and requested the court to instruct the jury to disregard them in considering of their verdict, the court simply requested the attorney to keep within the record, and wholly failed, either orally or by written instruction, to instruct the jury as requested by defendant.

The remarks were simply inexcusable, and ought not to have been tolerated in a court of justice. They cast unwarranted reflections upon the integrity of the attorney for the defendant, and heaped upon the defendant the worst kind of personal abuse. In part, the remarks were disrespectful to the court. They were not supported by the facts in evidence, in no way served to make plain the issues joined between the

State and the defendant, were wholly out of place, and were calculated to inflame the passions of the jury against the defendant, who was entitled to a fair and impartial trial without having heaped upon his head personal abuse in the presence of the court and jury. [Sherwood's Commentaries on the Criminal Law of Missouri, 810; State v. Young, 99 Mo. 666; State v. Jackson, 95 Mo. 623; State v. Fischer, 124 Mo. 460.]

In view of the outrageous character of the remarks complained of, the court failed of its duty in not reprimanding the prosecuting attorney, and directing the jury by a written instruction, as requested by defendant, to disregard said remarks and statements in considering of their verdict.

For these considerations the judgment is reversed and the cause remanded.

All concur.

THE STATE v. ED ARMSTRONG, Appellant.

Division Two, May 14, 1907.

1. **CONFESSION: Presumed To Be Voluntary: Evidence.** A confession is presumed to be voluntary until the contrary is shown. And where defendant testifies that he made the confession under threats and promises, and witnesses for the State, who were present when the confession was made, testify that there were no threats or promises, the trial court is in a better position than is the appellate court to determine whether or not the confession was voluntarily made.
2. ———: **Made to Officer.** The fact that the confession is made to an officer or in the presence of an officer, after defendant has been arrested, is not of itself sufficient to warrant the court in excluding it.

Appeal from Jackson Criminal Court.—*Hon. B. J. Casteel*, Special Judge.

AFFIRMED.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

“The presumption is that confessions have been freely made until the contrary appears.” *People v. Barker*, 60 Mich. 295; *State v. Myers*, 99 Mo. 119; *Com. v. Culver*, 126 Mass. 464; 1 Chitty’s *Crim. Law*, 571; *Roscoe’s Crim. Evidence*, 43; 3 *Rice on Crim. Evid.*, sec. 309. The fact that the confession was made to an officer, or in the presence of an officer, after the defendant had been arrested, did not tend to prove that any undue influence was used, or that any threats were made or promises were held out. *State v. Jones*, 171 Mo. 406; *State v. Brennan*, 164 Mo. 487; *State v. Guy*, 69 Mo. 432; *State v. Simon*, 50 Mo. 372; *State v. Davis*, 53 Pac. 682.

FOX, P. J.—This cause reaches this court by appeal on the part of the defendant from a judgment of the criminal court of Jackson county, convicting the defendant of fraudulently voting under the name and in the place of one Ben Trimble, who was a legally qualified and registered voter. The information was filed on the 27th of April, 1905, and the cause was continued until June, 1906, when Judge Wofford, the regular judge of that court, disqualified himself, and Judge Casteel was invited to try the case. The defendant was tried on the 7th of June, 1906. Upon the trial the evidence as introduced by the State tended to prove that on the 8th day of November, 1904, a general election was held in Kansas City, Missouri, for the election of county and State officials, and that one Ben Trimble was a duly qualified and registered voter of Kansas City, residing at 1406 East Fourteenth street, which was within the sixth precinct of the ninth ward of said city; that on said day the defendant ap

peared at said precinct, gave his name as Ben Trimble, asked for and procured a ballot, and returned the same to the judges, still saying that his name was Ben Trimble. Certain challengers present, having reason to believe that the defendant was not the person he claimed to be, followed him out into the alley and up behind a livery stable, where he stated to them and to the officers who went with them that his name was Ed Armstrong. When asked if he had not voted in the name of Ben Trimble, the defendant denied the same. The defendant was arrested and taken to police headquarters, where he admitted to various persons that he had voted under the name of Ben Trimble, and thereupon made the following confession:

“Kansas City, Mo., Nov. 9, 1904.

“My name is Ed. Armstrong. I was born in Independence, Mo. I live at 1609 E. Thirteenth street. I voted my right name in the fifth precinct of the ninth ward. I then drove to a livery stable at 1426 Virginia, with Jno. Brown, Walter King, another colored man and two white men. One of the white men I took to be a Jew. In the livery stable he gave out cards to five or six colored men, among whom were Walter King and Jno. Brown, and told them he would pay them if they would impersonate those names and vote those named for the straight Democratic ticket. I had previously gotten my card from a white man out on the street. My card had the name of Ben Trimble, 1406 E. Fourteenth street. I went to the sixth precinct of the ninth ward with Jno. Brown, Walter King, another colored fellow and this white man who gave out the slips. We drove to the livery stable in a surrey drawn by gray horses, and this man sat on the seat with the driver. At the polling place I voted the straight Democratic ticket in the name of Ben Trimble. The white man who gave out these slips in the livery stable, and who rode on the seat with the driver, is

the same man whom I asked while he was standing in front of the police box, at Fifteenth and Virginia, for tobacco, with which to make a cigarette, and who informed me that he had no tobacco and gave me a nickel to buy it. The gentleman whom I now see, and who claims to be Bob Owens, was standing near us at the time of this last occurrence, and afterwards talked to the man who gave me the nickel.

“ED. ARMSTRONG.

“Witnesses:

“J. E. Goodrich,

“A. O. Harrison,

“Buchholz,

“Officer Julian.”

The State's evidence further tended to show that this confession was voluntary and made without any promises or threats.

The defendant's evidence tended to show that this confession was extorted from him, and that the same was not voluntary; that while he signed the written statement, he did not read it over, and no one read it to him in full. The defendant further testified that he did not vote at said precinct under the name of Ben Trimble, and did not vote at all.

At the close of the evidence the court fully instructed the jury upon every phase of the case to which the testimony was applicable. We have carefully read the instructions as given by the court and deem it unnecessary to reproduce them here. The cause being submitted to the jury upon the testimony as offered and the instructions of the court, they returned a verdict finding the defendant guilty as charged in the information and assessed his punishment at two years in the State penitentiary. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Judgment was entered in conform-

ity to the verdict and from this judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

OPINION.

Appellant is not represented in this court; therefore, in obedience to the provisions of the statute we have carefully analyzed the entire record with the view of ascertaining if there was any error committed by the trial court in the disposition of this case. The information upon which this judgment rests was duly verified by the prosecuting attorney and is in good form, charges every essential element of the offense as defined by the statute, and is in harmony with precedents which have met the approval of this court. We have carefully considered the instructions given by the court and find that they are a clear and eminently fair and just presentation of the law applicable to the case and extremely favorable to the defendant upon the facts developed at the trial. We have taken the pains of going through the record to ascertain if there was any error committed in the admission or exclusion of evidence, and it is sufficient to say that we find no reversible error. In view of the testimony which so unerringly points to the guilt of the defendant, the errors complained of by the appellant in the exclusion of testimony on his part were harmless and fall far short of affording reasons for the reversal of this judgment.

Appellant complains of the admission of his confession, as indicated in the statement of this cause, for the reason, it is asserted, that this confession was not a voluntary one and therefore inadmissible. The trial court made the preliminary inquiry as to the conditions surrounding the making of this confession and held that the State made a sufficient showing to admit it in evidence. Witnesses Harrison and Goodrich testified

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for the State that no inducements were held out to the defendant and no threats made to bring about this confession. This testimony, together with the presumption that the confession was freely made until the contrary appears, was a satisfactory basis for the ruling of the court that it was admissible. While it may be said that the defendant testified that threats and promises were made and that he never read the confession and that it was not read over to him and that he did not fully understand it, yet we feel that the trial court was in a far better position, having the witnesses before it, to determine that question than this court, which has nothing but the cold recitals in the record detailing what the witnesses said. There was nothing in the nature of this confession or the way in which it was made that rendered it inadmissible. A confession is presumed to be voluntary unless the contrary is shown, or something appears in the confession or its attendant circumstances to combat such presumption. [State v. Meyers, 99 Mo. l. c. 119; State v. Patterson, 73 Mo. 695; State v. Hopkirk, 84 Mo. 278.] The fact that the confession was made to an officer or in the presence of an officer after the defendant had been arrested, is not sufficient to warrant the court in excluding the confession. The proof of such facts did not establish the ultimate fact that undue influence was used or threats made or promises held out in order to secure the confession. [State v. Jones, 171 Mo. l. c. 406; State v. Brennan, 164 Mo. 487; State v. Guy, 69 Mo. l. c. 432; State v. Simon, 50 Mo. l. c. 372.]

We deem it unnecessary to discuss the testimony developed at the trial. We have indicated substantially the nature and character of it in the statement of this cause and it is apparent that, if the jury believed the witnesses testifying for the State, no other conclusion could have been reached by them than the one indicated

by their verdict. We have carefully considered the testimony as disclosed by the record and it fully supports the conclusion reached by the jury, and we see no escape from the result in this cause that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

THE STATE v. JOHN KING, Appellant.

Division Two, May 14, 1907.

1. **THREATS: Evidence.** It was not error to admit in evidence threats made by defendant against deceased a week or two prior to the homicide.
2. **INSTRUCTION: Self-Defense: Requested by Defendant.** Where, as in this case, the court has already fully instructed on the law of self-defense, there is no error in refusing an instruction, requested by defendant, embodying the same proposition.
3. **———: ———: Evidence.** Under the facts as detailed by defendant himself, and by the State's witness, there was no call for an instruction on self-defense.
4. **———: Conspiracy: Assault: No Request.** There was no error in the court's failure to instruct as to the effect of a conspiracy followed by an assault upon defendant, for the reasons, first, there was no proof of such a conspiracy followed by an assault, and if there had been, the court's instruction on self-defense fully covered the law in that regard; and, second, the court's attention was not called to its failure to instruct on that point.
5. **FIRST DEGREE MURDER: Sufficiency of Evidence.** Evidence held sufficient to justify the verdict finding defendant guilty of murder in the first degree.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

John E. Bowcock for appellant.

The error complained of by appellant arises from the failure and refusal on the part of the court to instruct the jury as to the effect of a prior conspiracy followed by an assault made upon the appellant at the instigation of the deceased, as characterizing the feeling and the intentions of deceased towards appellant, as well as explanatory of the justifiableness on the part of appellant to act upon a slighter appearance of danger than he would where threats only had been made against him unaccompanied by any attempt to put the same into execution, the court simply leaving the jury under the impression that threats and an assault, no matter how dangerous the assault was intended to have been, were synonymous in law, whereas it was the duty of the court to have fully instructed the jury upon all the law applicable to all the material facts in the case as required by Laws of 1901, page 140. *State v. Patrick*, 107 Mo. 147; *State v. Nelson*, 118 Mo. 124; *State v. Weakly*, 178 Mo. 413.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) Defendant's counsel made objections to certain threats which State's witness Douglass testified that defendant made against deceased. This witness testified that said threat was made a week or two before Thanksgiving, and this homicide was committed on the 28th day of November. It is clear, therefore, that the threat was sufficiently recent to be of evidentiary value in this case. *State v. Callaway*, 154 Mo. 91; *Underhill on Crim. Evid.*, secs. 328 and 333; 1 *Wigmore on Evidence*, sec. 108. (2) No instruction on the subject of self-defense was necessary, as the evidence fails to show that, in any aspect of the case, defendant acted in self-defense. The two eyewitnesses,

who were called in behalf of the State, testified that defendant shot deceased in the back; that she fell on her face to the sidewalk, and that defendant continued to shoot. Dr. Abeken testified to finding four wounds in the body of deceased, all of which entered from the rear. While the defendant testified to the effort deceased made to draw a pistol, that she was turning as if to come towards him; yet his evidence is contradicted by the physical facts in the case. If deceased had turned to come towards defendant, or if she was turning around, the bullets could not possibly have entered her back in the way they did. Upon the reasonableness of the testimony, this court, in *State v. Dettmer*, 124 Mo. 435, said: "When witnesses attempt to establish a certain theory by their testimony, they must first look to it well that their testimony must not go counter to the physical facts in the case; for if it does, neither courts nor juries are required to stultify themselves by disbelieving the immutable physical facts in the case, and so we have said on a number of occasions." *State v. Turlington*, 102 Mo. 642; *State v. Bryant*, 102 Mo. 24; *State v. Anderson*, 89 Mo. 332; *State v. Nelson*, 118 Mo. 124; *State v. Nocton*, 121 Mo. 537; *State v. Fraga*, 97 S. W. 900. But even if this court shall conclude that an instruction on self-defense was proper, it will be seen that the State's instruction on that subject was full and fair, and all that the defendant was entitled to. *State v. Gee*, 85 Mo. 647; *State v. Pennington*, 146 Mo. 35. It was not error to refuse an instruction asked by defendant, when another instruction had been given by the court on the same subject and embodying the same proposition of law. (3) The evidence is more than sufficient to justify a conviction of the defendant of murder in the first degree. *State v. Reed*, 117 Mo. 604; *State v. Garth*, 164 Mo. 553; *State v. Callaway*, 154 Mo. 91; *State v. Eaton*, 191 Mo. 51; *State v. Worton*, 139 Mo. 526.

GANTT, J.—From a conviction of murder in the first degree in the circuit court of the city of St. Louis, the defendant has appealed to this court. The prosecution was begun by an information filed by the circuit attorney on January 5, 1906, in which the defendant was charged with the murder of Hallie Douglas, a young woman about twenty years of age, on the 28th of November, 1905. The defendant, the deceased, and nearly all of the witnesses were negroes.

On the part of the State the testimony tended to show that the defendant and the deceased had been on friendly and intimate terms for some time, and until within a few days of the homicide. On the afternoon of the homicide, the deceased was at the residence of Max Anderson, another negro, on Gratiot street. At that time Max Anderson, Bud Anderson, Chas. Franklin, Hallie Douglas and Mabel Douglas, all negroes, were at the house of Max Anderson and his mother on Gratiot street. The defendant passed this house and looked in at the window, and in a few minutes returned and knocked on the door. It seems that Max Anderson suspected that defendant's mission was anything but friendly and before opening the door got his pistol and then admitted the defendant. The defendant at once addressed himself to the deceased, Hallie Douglas, and requested her to come out of the house, as he wanted to see her, and she replied, "Go ahead, I am coming out," but did not start at once to go. At this point the defendant had his hand in his pocket and started to draw a pistol; when he made this motion, Max Anderson drew his pistol on the defendant and ordered Franklin to take the gun out of defendant's pocket and said to the defendant, "What do you mean by coming in here and pulling out a gun?" and struck defendant on the side of the head with the pistol, knocking defendant to the floor and discharging Anderson's pistol. Defendant was not shot but it seems

he thought he was. Anderson then commanded him to get up, that he was not hurt, and after some parley either Anderson or Franklin withdrew the cartridges from the pistol of defendant and gave it back to him. Defendant then left Anderson's house. The deceased and her sister Mabel also left the house and went to the Four Courts to swear out a warrant for the defendant, but reached the office of the warrant clerk too late in the afternoon and they then started to return to their home. The defendant followed them down to the Four Courts and quarrelled with them and said he would give them something to swear out a warrant for. The deceased and her sister started up Clark avenue to Thirteenth street and defendant walked along the street with them. The deceased and her sister then continued their way towards their home and when they reached Twenty-first and Papin streets they discovered defendant coming from Twenty-second and Papin towards the bridge on Papin street; when they discovered him he was hurrying towards them, and they ran over on Twenty-first street to Chouteau avenue and on Chouteau to the grocery store of Class on the corner of Chouteau and Twenty-second; there the deceased and her sister separated, the deceased going into the grocery store and her sister going on to her home. The deceased remained in this store until her mother came. While the deceased was waiting in the grocery store, the defendant came in and approached her where she was sitting by the counter, and was heard by Mr. Elmore, a clerk in the store, to say that he intended to have a warrant issued for the arrest of the deceased. Beyond this nothing unusual occurred in the store. When the deceased's mother came up to the front door of the store she either called or motioned to the deceased to come to her and the deceased got up off of the stool, walked to the front door and got out on the sidewalk and turned with her mother

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to go west in the direction of their home. The defendant also went out of the front door of the grocery store and started in the opposite direction; after taking a few steps, the defendant wheeled around, drew his pistol and followed the deceased and her mother, and when within about five feet of the deceased, shot her in the back, and when she fell to the sidewalk, stood over her and fired four more shots into her person. Death was almost instantaneous.

The evidence on the part of the State was conclusive that the deceased had no pistol, said nothing about a pistol, made no threats or motion indicating that she was trying to draw one. After killing the deceased the defendant walked to the corner of Twenty-second street and Chouteau, turned on Twenty-second street and went about a block distant, broke down his pistol and threw out the empty shells. He then went to a near-by police station and surrendered himself. Autopsy was held on the body of the deceased by doctor Abeken, the surgeon in charge at the coroner's office, from which it appeared that the deceased was shot in the back, twice in the forearm and once through the upper part of the body through the chest. The shot that entered the back from the back and came out through the left side of the neck was the mortal wound from which the deceased died. The physician testified that an examination of the body showed that it was wholly normal in all other respects. There was also evidence that the defendant had made divers threats towards the deceased to the effect that, if she turned him down, he would kill her.

The defendant testified in his own behalf and detailed the difficulty at Max Anderson's house on the afternoon of the homicide and claimed that Anderson was the aggressor, and that defendant had gone to the Four Courts for the purpose of having Anderson and his household arrested, but found the clerk's office

closed, and that on his return home he saw the deceased sitting on a stool in Class's grocery store, and she beckoned him to come in; that he went in and told her he intended to have her arrested for carrying a pistol, and that he then and there saw the shape of a pistol in the bosom of her dress; that her mother then appeared at front door of the grocery store and beckoned the deceased to come out; that he and the deceased left the store about the same time and walked in opposite directions; that he heard the deceased's mother say, "Why don't you kill the black s— of a b—; what have you got your gun for?" that he looked back and saw deceased turning around and trying to draw a revolver from her bosom; that it was then, and not until then, he drew his pistol and shot the deceased; that he was frightened and excited and did not know how many shots he fired, but denied that he fired any after she had fallen.

Defendant introduced one witness, Jesse Hulbert, another negro, who testified that on the Sunday night before the homicide on Tuesday, the deceased and the defendant came to his house, number 2120 Chestnut street, about half past eleven o'clock and stayed until twelve; that when they came it appeared as if they had had a squabble before they got there. While there the defendant upbraided the deceased for going down to Gratiot street after he had been so good to her and she replied, "Nobody can make me have anybody if I don't want to." That she thereupon said, "To-morrow I am going to get me a 38," and witness asked her, "What are you going to get a 38 for?" and she said, "I have got \$3.50 at home, and I am going to get me a 38 with it and I will fix King." After she said this, the defendant said he would go, and he and the deceased left together. There was also evidence tending to show that the deceased was the mistress of the defendant. He testified that he had regularly supplied

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her with money from his wages for sometime previous to the homicide. At the close of the evidence the court instructed the jury upon murder in the first degree, murder in the second degree and self-defense and upon threats by the deceased against the defendant, and also gave the usual instructions on the presumption of innocence, credibility of witnesses and reasonable doubt.

1. The information in this case was in all respects, save as to the name of the defendant and the deceased, in the form approved by this court in *State v. Gray*, 172 Mo. 434, 435, and *State v. Wilson*, 172 Mo. 420. The indictments in both of said cases received the approval of this Court in Banc, and have often since been approved by this Division.

2. There was no error in the admission in evidence of the threats made by the defendant against the deceased a week or two before Thanksgiving, 1905. The homicide occurred on November 28, 1905. [*State v. Callaway*, 154 Mo. 91.] The trial court was exceedingly careful in guarding the rights of the defendant as to other threats which the State sought to get before the jury. And also in excluding evidence tending to show that the defendant had been convicted of an assault with intent to kill prior to the homicide. Indeed, a careful examination of the whole record discloses no error in the admission or rejection of testimony; where there was a doubt, the court resolved it in favor of the defendant. The only errors assigned by the defendant in this court relate to the failure and refusal of the court to instruct and not as to any alleged errors in the admission or rejection of testimony.

3. As already said, the court instructed on both degrees of murder, and as those instructions are full and complete and such as have uniformly received the approbation of this court, it is deemed unnecessary to burden the reports with their reproduction. In its

instruction numbered 4, the court directed the jury as follows:

“The defendant admits the shooting, but claims he acted in self-defense. Upon this question the court instructs you that if you find from the evidence that when defendant shot the said Hallie Douglas, he had reasonable cause to believe and did believe that said Hallie Douglas was about to take his life or do him some great personal injury, and further, that he had reasonable cause to believe and did believe that it was necessary for him to so shoot said Hallie Douglas in order to protect himself from such danger, then he ought to be acquitted on the ground of self-defense. Whether defendant had reasonable grounds to believe that such danger existed, and whether he shot said Hallie Douglas in the honest belief that it was necessary for the protection of his life or person, are questions which you must determine from all the evidence in the case. Although defendant may have really believed himself to be in danger, yet he cannot be acquitted on the ground of self-defense unless it further appears from the evidence that he had reasonable cause for such belief. On the other hand, even if no real danger existed, yet if the defendant had reasonable ground to believe and did believe that it existed, he would be justified in acting upon such belief. If you believe from the evidence that the defendant shot the deceased, Hallie Douglas, unnecessarily, and when he did not have reasonable cause to believe that the deceased was then about to kill him or do him some great bodily harm or personal injury, then there is no self-defense in the case, and you cannot acquit the defendant on that ground.” And in the same connection gave instruction numbered 5, as follows:

“In determining whether the defendant was justified in acting upon appearances and shooting the deceased, the jury may take into consideration any

threats that may have been made by deceased against the life of the defendant and communicated to defendant prior to the killing, if the jury find from the evidence that any such threats were made and communicated. You shall consider all the threats which you may believe from the evidence were made by the deceased against the defendant, and may give them such weight in determining the nature of the transaction giving rise to the charge for which the defendant is now on trial as you deem proper. Mere threats, however, will not justify on the ground of self-defense the shooting of one by another, nor will threats alone warrant the party against whom they are made in attacking and killing the party who made them, unless at the time of the shooting the party making such threat or threats does some act indicating a purpose to execute the same or that the party against whom they are made then has reasonable ground to believe and does believe such threat or threats are about to be executed."

The defendant complains of the refusal to give the following instruction asked in his behalf:

"The defendant admits the shooting of the deceased, Hallie Douglas, but claims that he acted in self-defense. Upon this question the court instructs you that if you find from the evidence that when the defendant shot and killed Hallie Douglas he had reasonable cause to believe that the said Hallie Douglas was about to take his life or do him some great personal injury, in this connection the jury may take into consideration any threat or threats that the deceased may have made towards the defendant (if you believe that she made such threat or threats), and that when the defendant shot and killed the deceased he honestly believed that the said Hallie Douglas had upon her person a revolver, and further believed that the deceased at the time and place intended and was about to put

said threat into execution, and that it was necessary for him to shoot the said Hallie Douglas, in order to protect him from such danger, then he ought to be acquitted on the ground of self-defense. Whether defendant had reasonable ground to believe that such danger existed, and whether he shot the said Hallie Douglas in the honest belief that it was necessary for the protection of his life or person, are questions which you must determine from all the evidence in the case. Although defendant may have believed himself to have been in danger, yet he cannot be acquitted on the ground of self-defense, unless it further appears that he had reasonable cause for such belief. On the other hand, even if no real danger existed, yet if the defendant had reasonable ground to believe and did believe that it existed, he would be justified in acting upon such belief. If you believe from the evidence that the defendant shot the deceased unnecessarily, and when he did not have reasonable cause to believe that the deceased was then about to kill him or do him some great bodily harm or personal injury, then in that event there is no self-defense in the case, and you cannot acquit the defendant on that ground."

A comparison of instruction numbered 4 given on behalf of the State, with the refused instruction asked by defendant, will demonstrate that the court in its instruction numbered 4 had already fully instructed the jury upon the law of self-defense, and there was no error in refusing to repeat the instruction embodying the same proposition of law. [State v. Easton, 138 Mo. 103.] In our opinion, the facts of the case as detailed by the defendant himself, to say nothing of the overwhelming proof to the contrary by the disinterested witness, Mr. Elmore, for the State, did not call for an instruction on the law of self-defense. The evidence of the surgeon who made the post-mortem examination, establishes the fact that all four of the

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wounds inflicted by the defendant upon the deceased entered her person from the rear, and the evidence shows that the deceased and her mother were peacefully wending their way towards their home, and the defendant had started in the opposite direction and of his own accord faced about and followed the deceased and shot her in the back without any provocation whatever. His testimony as to her attempting to draw a pistol is completely rebutted by the physical facts in the case. Besides, the whole evidence shows that the deceased had no weapon on her person at the time she was shot. It has often been said by this court that neither courts nor juries are required to stultify themselves by rejecting the immutable facts in a case. [State v. Turlington, 102 Mo. 642; State v. Nelson, 118 Mo. 124; State v. Fraga, 199 Mo. l. c. 136.]

In the brief of the learned counsel for the defendant, however, it is said that the failure of the court to instruct the jury as to the effect of a prior conspiracy followed by an assault upon the defendant as tending to characterize the feeling and intention of the deceased towards the appellant and thus justifying him in acting upon slighter pretense of danger, was error. Two reasons appear to us why no error occurred in this respect. The first is, there was no proof of such a conspiracy followed by an assault, and if there had been, the instruction of the court on self-defense fully covered the law in that regard; and, secondly, the court's attention was not called to any failure to instruct on that point of law. [State v. Bond, 191 Mo. l. c. 563; State v. McCarver, 194 Mo. l. c. 742.] In our opinion, the court fully and fairly instructed upon every proposition of law arising upon the evidence in the case, and in giving the instruction on self-defense was more favorable to the defendant than the facts justified, but of this, of course, the defendant cannot complain, as it was an error, if any, in his favor.

4. A careful and critical examination of the testimony in this case discloses that the jury was fully justified in returning a verdict of murder in the first degree. It demonstrates that the defendant, actuated by jealousy, deliberately followed the deceased, after threatening to kill her, into the grocery store on Chouteau avenue whither she had fled for safety from him; that after her mother had come to the store to protect her and take her home, the defendant without the slightest provocation, without a word being spoken, turned from his course to the east and rapidly approached her and shot at her five times, inflicting four wounds from the rear. The deceased was entirely unarmed and was making no demonstration, and, the evidence would show, was wholly unaware of the approach of the defendant until he shot her. After his victim had fallen to the sidewalk, he wantonly fired three more shots into her prostrate body. Indeed, all the evidence evinces such a willful, deliberate, premeditated and malicious homicide on the part of the defendant, that the jury could not have reasonably reached any other verdict in the case. The verdict and the sentence of the trial court must be affirmed and the sentence which the law pronounces is directed to be carried into execution.

Fox, P. J., and Burgess, J., concur.

THE STATE v. CAL GRIFFITH, Appellant.

Division Two, May 14, 1907.

NO BILL OF EXCEPTIONS. Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed.

Appeal from Pike Circuit Court.—*Hon. David H. Eby,*
Judge.

AFFIRMED.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

Where there is no bill of exceptions, and no error appearing in the record proper, the judgment will be affirmed. *State v. Nicholas*, 193 Mo. 214; *State v. Sparks*, 191 Mo. 162.

BURGESS, J.—On the 5th day of October, 1905, the prosecuting attorney of Pike county filed an information, charging the defendant with burglary and larceny. The date of the alleged offense was the 28th day of June, 1905, the building entered was the warehouse of the Diamond Flour Manufacturing Co., and the property stolen was two faucets of the value of two dollars. At the February term, 1906, of said court, the defendant was tried and convicted, and his punishment assessed at three years imprisonment in the penitentiary for the burglary and two years for the larceny. He was granted an appeal.

The defendant is not represented in this court. As there was no bill of exceptions filed, there is nothing before this court for review except the record proper, and that appears to be free from error.

The judgment is, therefore, affirmed. All concur.

THE STATE v. JOSEPH A. HELDERLE, Appellant.

Division Two, May 14, 1907.

1. **ILLEGAL VOTING:** Information: Invalid. Information, set out in the statement, for illegal voting in election precincts in the city of St. Louis, held, invalid.
2. ———: ———: Uncertainty. Where the information charges that defendant voted at the Fifth precinct and that he thereafter on the same day appeared at the Second precinct and did then and there before the judges of the Fifth precinct fraudulently apply for a ballot and feloniously cast said ballot and vote at said election, the information is too indefinite to base a conviction upon.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

REVERSED AND REMANDED.

S. S. Bass, Anthony Hochdoerfer, T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe for appellant.

The information is insufficient. It was error not to sustain defendant's motion to quash or his motion in arrest of judgment. *State v. Keating*, 202 Mo. 197; *State v. Sekrit*, 130 Mo. 401; *State v. Kreuger*, 134 Mo. 262; *State v. Hardelein*, 169 Mo. 579; *State v. Burke*, 151 Mo. 142; *State v. Miller*, 132 Mo. 297; *United States v. Hess*, 124 U. S. 483; *McCrary on Elections*, sec. 594; *Laws 1903*, sec. 32, p. 186; sec. 2120k, p. 159.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

It is conceded that the information is insufficient.

FOX, P. J.—This cause is now before this court upon appeal from a judgment of the circuit court of the city of St. Louis convicting the defendant of voting more than once at different election precincts in the

city of St. Louis in violation of section 2114, Revised Statutes of Missouri, 1899. As the main contention upon this appeal consists of a challenge to the sufficiency of the information, we here, omitting formal parts, reproduce it. It is as follows:

“Comes now Arthur N. Sager, circuit attorney, within and for the city of St. Louis (said city comprising the Eighth Judicial Circuit of the State of Missouri), and now here in court, on his official oath, and on behalf of the State of Missouri, information makes, that on the fourth day of April, one thousand nine hundred and five, at the city of St. Louis aforesaid, and in each ward and election precinct of the said city of St. Louis, a municipal election was had and held pursuant to the Constitution and the laws of the State of Missouri, and the Scheme and Charter of the said city of St. Louis thereunder enacted, for the choice and election of certain municipal officers of the said city, to-wit: Mayor, Comptroller, Auditor, Treasurer, Register, Collector, Inspector of Weights and Measures, Marshal, President of the Board of Assessors, President of the Board of Public Improvements, President of the Council, Members of the City Council, Members of the Board of Education, and Members of the House of Delegates from the several and respective wards of the said city; and that then and there, at the said city of St. Louis, and at the polling places of the Fifth Election Precinct of the Eighth Ward of the said city, at the southwest corner of Broadway and Ann avenue, on the said fourth day of April, in the year one thousand nine hundred and five (the same being the first Tuesday in April of said year), at the municipal election aforesaid, and before the duly appointed and qualified judges and clerks of election within and for the said election precinct, one Joseph A. Helderle did appear and did then and there, before the judges and clerks of election aforesaid, apply for and receive a bal-

lot, and did then and there cast said ballot and vote at said election; and that the said Joseph A. Helderle afterwards, to-wit, on the same day and at the same election, did appear at the polling place of the second precinct of the Eighth Ward of said city at No. 417 Lami street, and that he, the said Joseph A. Helderle, did then and there, before the duly appointed and qualified judges and clerks of election of the said Fifth Precinct of the said Eighth Ward, knowingly, wilfully, fraudulently and feloniously apply for and receive a ballot, and did then and there knowingly, wilfully, fraudulently and feloniously cast said ballot and vote at said election; and, so the said Arthur N. Sager, circuit attorney as aforesaid, upon his oath aforesaid, does say, that the said Joseph A. Helderle, on the said fourth day of April, in the year one thousand nine hundred and five, in the city of St. Louis aforesaid, knowingly, wilfully, fraudulently and feloniously, did vote in more than one election precinct, at the election aforesaid, so held as aforesaid, for the election of municipal officers aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The sufficiency of this information was questioned both by motion to quash and a motion in arrest of judgment. On the 5th day of March, 1906, at the February term, 1906, of the circuit court, the defendant was put upon his trial. We deem it unnecessary to set out the testimony upon which this judgment is based. It is sufficient to say that the evidence developed at the trial is in conflict, and owing to the uncertainty of the charge as contained in the information it is difficult to analyze the testimony and apply it to the allegations contained in it. We are unable to clearly understand from the allegations contained in the pleadings whether it is intended to charge the defendant with voting more than once in one precinct or voting more than once at

different election precincts; therefore, we see no necessity for setting out in detail the testimony upon this trial, for the reason, as before stated, that we find difficulty in ascertaining the nature and character of the offense to which it is sought to make it applicable. In view of the fatal defects in the information, it can serve no good purpose to burden this opinion with a detailed statement of the testimony applicable to it.

At the close of the evidence the court instructed the jury upon the theory that the defendant was charged in the information with voting more than once at two different election precincts, and the cause was submitted to the jury upon the evidence and instructions, and they returned a verdict finding the defendant guilty as charged in the information and assessed his punishment at imprisonment in the city jail for the period of one year and a fine of \$50. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. The court rendered judgment in conformity with the verdict and from this judgment the defendant prosecuted this appeal, and the record is now before us for review.

OPINION.

With the views of this court as to the disclosures of the record before us, it is only necessary to treat of one proposition, which involves the sufficiency of the information upon which the judgment in this cause is predicated. The information is manifestly insufficient and it requires no citation of authorities to support that conclusion. The mere reading of it makes apparent the error. It will be observed that this information charges that the defendant appeared before the judges and clerks of the Fifth Election Precinct of the Eighth Ward of the said city of St. Louis at the southwest corner of Broadway and Ann avenue and applied for and received a ballot and did then and there cast

said ballot and vote at said election. This is followed by the allegation that on the same day and at the same election the defendant did appear at the polling place of the Second Precinct of the Eighth Ward of said city at No. 417 Lami street. And this is followed by a repetition of the allegation that he received from the judges and clerks of election of the Fifth Precinct of the Eighth Ward and applied for and received a ballot and wilfully, fraudulently and feloniously cast said ballot and voted at said election. There is an entire absence of any allegation in this information that he applied for or received a ballot or voted at the polling place of the Second Precinct of the Eighth Ward. It may be said that this is a clerical mistake, yet that it is fatal to the sufficiency of this information, is too plain for further argument.

We have deemed it unnecessary to analyze and discuss the testimony as applicable to the charge contained in this information, for the reason that we are unable to intelligently analyze this testimony and apply it to the charge in the information in its present form.

If this defendant voted at more than one election precinct on the same day and at the same election, he should be convicted, but a judgment of conviction can only be permitted to stand when it is predicated upon an information that substantially charges the offense.

For the purpose of giving the State, if it so desires, an opportunity of filing an amended information in which every essential element of the offense sought to be charged under the provisions of the statute may be embraced, the judgment of the trial court will be reversed and the cause remanded, and it is so ordered.

All concur.

THE STATE v. WILLIAM CUTBERTH, Appellant.

Division Two, May 14, 1907.

BILL OF EXCEPTIONS: Expiration of Time: Extension Thereafter. An order extending the time for filing bill of exceptions, made after the expiration of the time originally granted, is void; and in such case there is nothing for the appellate court to review except the record proper.

Appeal from Stone Circuit Court.—*Hon. Jno. T. Moore,*
Judge.

AFFIRMED.

T. L. Viles and *G. W. Thornberry* for appellant.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

There is nothing before this court except the record proper; and, no error appearing therein, the judgment should be affirmed. *State v. Eaton*, 191 Mo. 151; *State v. Thompson*, 149 Mo. 439; *State v. Britt*, 117 Mo. 584.

GANTT, J.—On the 10th of March, 1906, the prosecuting attorney of Stone county filed an information, duly verified, wherein he charged the defendant with murder in the first degree of Sam Marlatt in Stone county on the 13th of January, 1906.

At the March term of the said court, the defendant was tried and convicted of murder in the second degree and his punishment assessed at fifteen years in the penitentiary.

Motions for a new trial and in arrest of judgment were duly filed, heard and overruled, and the defendant sentenced to the penitentiary in accordance with the verdict. On the 19th of March, 1906, the court granted

defendant ninety days in which to file his bill of exceptions. He failed to file his bill within the ninety days, but on the 18th of June, 1906, obtained leave of the judge of the court to file the same within sixty days from the 19th of June, 1906. Excluding March 19, 1906, from the count the ninety days expired on June 17, 1906. As the time for filing the bill of exceptions had expired before the leave was granted by the court or judge thereof, the order attempting to extend the time was void and of no effect, as we have often decided. [State v. Paul, *infra* 681; Powell v. Sherwood, 162 Mo. l. c. 611, and cases there cited.] It results that there is nothing before us for consideration except the record proper. In this case the information is in all respects sufficient. It is in the form of the indictment which met the approval of this court in the cases of State v. Wilson, 172 Mo. 420, and State v. Gray, 172 Mo. l. c. 434.

An examination of the record shows a regular arraignment of the defendant, and the empaneling of the jury, the return of the verdict, and the sentence of the court.

As there are no errors of which we can take cognizance, the judgment and sentence of the circuit court must be and is affirmed.

Fox, P. J., and Burgess, J., concur.

THE STATE v. KID HOLDEN, Appellant.

Division Two, May 14, 1907.

1. **APPEALS: Motion for New Trial: Indefinite Assignment.** An assignment in the motion for new trial that the court erred in admitting illegal and irrelevant testimony, is not sufficiently definite; and the appellate court will not go through the record to discover such testimony.
2. **INSTRUCTION: Limiting Time: Harmless Error.** An instruction which limits the time of the commission of the offense to the year 1906, instead of three years prior to the time of the filing of the information, is an error in defendant's favor, of which he can not complain.
3. **GAMBLING: Crap Table: Sufficiency of Evidence.** Evidence held sufficient to support the verdict finding defendant guilty of setting up and operating a crap table for the purpose of playing games of chance for money and property.

Appeal from Jasper Circuit Court.—*Hon. Howard Gray, Judge.*

AFFIRMED.

Herbert S. Hadley, Attorney-General, and N. T. Gentry, Assistant Attorney-General, for the State.

(1) The evidence, and all the evidence, showed that the crime charged was committed during the month of February, 1906, and prior to the filing of the information, which was February 26, 1906. So the jury could not possibly have been misled; neither was it possible for defendant to have been convicted of any crime committed prior to the time limited by the statute in such cases. (2) The simple statement of the facts is sufficient to convince any one of the guilt of defendant; for, had defendant not been guilty, he never would have been in the position in which he was found on that Saturday night, surrounded by the persons, tables and devices described by the witnesses. State v.

Miller, 190 Mo. 449; State v. Cronin, 189 Mo. 663; State v. Locket, 188 Mo. 415.

BURGESS, J.—On February 26, 1906, the prosecuting attorney of Jasper county filed an information, and on March 6, 1906, he filed an amended information, duly verified, by which he charged that the defendant, on the — day of February, 1906, feloniously did set up, keep and operate a certain table and gambling device, commonly called a “crap table,” which table was adapted, devised and designed for the purpose of playing games of chance for money and property. Defendant was tried on March 13, 1906, and convicted, and his punishment assessed at twelve months in the county jail. After filing formal motions for new trial and in arrest of judgment, which were overruled, defendant appealed.

The State's evidence tended to prove that Sheriff Marrs, Deputy Sheriff Marquiss and Deputy Sheriff Kier raided a certain room in the second story over the Woodbine saloon in the city of Joplin on one Saturday night in the month of February, 1906. Prior to forcing their way into said room, these officers went up an alley, climbed over a fence and got up on a flat roof of a one-story building and looked into the windows to see what was going on in said room. They saw a number of people up there, including the defendant, who were engaged in gambling. The defendant was standing behind a crap table dealing craps, and several others were around the table on the outside, rolling two dice across the table. The defendant was paying the bets and cashing in the checks. The others were standing on the outside of the table and were placing their checks down on the table and rolling the dice. The table was identified by the officers as what is commonly termed a crap table, and was about four feet high with a railing around it about four or five inches high, and was eight

feet long by three feet wide and covered with a green cloth. On one side of the table, about the center thereof, there was a little space cut out, and in this space the defendant was standing while the game was in progress. On this table were numbers corresponding with numbers that can be made on a pair of dice, and on this particular table were 4, 5, 6, 8, 9, and 10. The word "come" was also printed on the table, and this word is one that is used by gamblers in playing said game of chance. Dice were also found in the drawer of the table, and the defendant was seen watching the dice as others would throw them, and throwing them back to the player. The defendant was also seen dealing certain colored checks, round flat checks, which he gave in exchange for money. The officers further testified that the table which the defendant had charge of was the character of table devised, designed and made for playing the game of craps, and was commonly termed a "crap table."

The defendant introduced Burt Mann and A. M. Davis, who testified that they resided in Joplin, and were in this room the night that the officers raided the game. They also testified to their acquaintance with the game called "craps," and also to their acquaintance with the game called "klondike;" that the table identified and offered in evidence was the kind of table upon which the latter game was played, and that the defendant had no connection that night with the crap table, but was standing behind the "klondike" table. They further testified that the crap game was played with two dice, and that the dice offered in evidence were regulation dice. Mann, however, admitted that he was not at this crap table when the sheriff and his deputies came in, and hadn't been that evening, although he was "supposed to know" what was going on in that room that night; and Davis said, in explaining the use of the table, "We never used it as a crap table." When asked

whom he meant by "we," he replied that he meant the defendant in this case. For some reason, presumably a good one, the defendant did not testify in this case.

In rebuttal, the State produced the record of the circuit court of Jasper county, showing that defendant's witnesses, Burt Mann and A. M. Davis, were under arrest charged with being the keepers of and with running a gambling table in the same house on the night of the arrest of defendant, Kid Holden.

The defendant is not represented in this court. The amended information is properly verified, and complies with the statute and approved forms. [Sec. 2194, R. S. 1899; State v. Locket, 188 Mo. 415; State v. Rosenblatt, 185 Mo. 114.] There was, therefore, no error in overruling the motion to quash.

One of the errors assigned in the motion for new trial is the action of the court in admitting illegal and irrelevant testimony, but what particular testimony the motion has reference to we are not advised, nor do we know. The motion is entirely too indefinite, and we are not disposed to go through the record and take upon ourselves the burden of discovering, if perchance we could, the said illegal or incompetent testimony. It would have been easy to indicate in the motion or by brief the particular testimony complained of, which was not done.

It is also asserted in the motion that the court erred in its instructions for the State, but after carefully reading them, we are unable to discover anything objectionable in any of the instructions excepting possibly in the second. It is as follows:

"The court instructs the jury that if they find and believe from the evidence in this case that the defendant, at the county of Jasper and State of Missouri, in the year 1906, or at any time therein prior to the 26th day of February, did wilfully, unlawfully and feloniously keep a certain gambling device and table, com-

monly called a crap table, and that the same was then and there a gambling device, adapted, devised and designed for the purpose of playing games of chance for money and property, and that the defendant did then and there unlawfully, wilfully and feloniously entice, induce and permit certain persons to bet and play at and upon a game played at and by means of such gambling device, and for which the same was adapted, devised or designed, on the side and against the keeper thereof, then you will find the defendant guilty and assess his punishment at imprisonment in the penitentiary for a term not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

While this instruction is subject to verbal criticism, we do not think it misleading, confusing or erroneous. It limits the jury not to the three years next preceding the date of the filing of the information, but to the year 1906, while the information was filed in March, 1906; so that if there was any error in the instruction, it was in favor of the defendant, of which he has no right to complain.

The evidence showed very conclusively that defendant was guilty as charged. The judgment is affirmed.

All concur.

THE STATE v. JOHN GRANGER, Appellant.

Division Two, May 14, 1907.

1. **BILL OF EXCEPTIONS: Expiration of Time: Extension Thereafter.** When the time granted for filing the bill of exceptions has expired, neither the judge in vacation nor the court at a subsequent term has power to extend the time. And a bill of exceptions filed in pursuance of such void order will not be considered on appeal.
2. **INFORMATION: One Count.** An information which first charges that defendant actually did the shooting, and then charges another party as accessory before the fact, and concludes, "against the peace and dignity of the State," contains but one count.
3. **——: Abbreviation.** An information is not defective merely because it employs the abbreviation "Jno." for the name John.

Appeal from Stoddard Circuit Court.—*Hon. Jas. L. Fort*, Judge.

AFFIRMED.

Ed. Edmonds, Joe Farris and T. H. Mauldin for appellant.

(1) The information contains two counts and neither concludes as required by law; and, as has been recently said in *State v. Coleman*, 186 Mo. 151, whatever certainty is requisite in an indictment, is necessary also in an information; and, consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital. (2) The information is utterly defective, in this: the first count does not charge John Granger with having committed an offense, but charges "Jno. Granger;" this of itself is a fatal error. In addition thereto, it does not conclude against the peace and dignity of the State as our courts have held it must do. 22 Mo. App. 655.

State v. Granger.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) The information, which was accompanied by the affidavit of the prosecuting attorney of Stoddard county, is sufficient in form and substance. *State v. Bradford*, 156 Mo. 95; *State v. Stacy*, 103 Mo. 11; *Kelley's Crim. Law*, sec. 474. (2) There is nothing before this court except the record, and no error appears in that. On October 2, 1905, defendant was granted an appeal, and leave was given him to prepare and file his bill of exceptions in ninety days thereafter. On January 2, 1906, defendant filed an order, signed by the trial judge, extending the time for filing said bill; but the time had then already expired. The bill of exceptions, therefore, cannot be considered as a part of the record in this cause. *State v. Eaton*, 191 Mo. 151; *State v. Thompson*, 149 Mo. 439; *State v. Britt*, 117 Mo. 584; *State v. Wilson*, 68 S. W. 68. Even though the parties believed that the bill of exceptions was filed in time, if the time had in fact expired, the bill will not be considered; and, when a certain number of days are given in which to file the bill, the time is counted by the days, not by the month. *Linahan v. Barley*, 124 Mo. 560; *Fulkerson v. Murdock*, 123 Mo. 292; *State v. Chain*, 128 Mo. 361; *McHoney v. Ins. Co.*, 44 Mo. App. 426.

FOX, P. J.,—This cause is brought to this court by appeal on the part of the defendant from a judgment of the circuit court of Stoddard county, convicting him of murder of the second degree. The record discloses that on October 2, 1905, the defendant was granted an appeal and leave was given him to prepare and file his bill of exceptions in ninety days thereafter. It is further disclosed by the record that on January 2, 1906, defendant filed an order signed by the trial judge, extending the time for filing said bill of exceptions. It is therefore apparent that the ninety days which the ap-

pellant had in which to file bill of exceptions had expired before the filing of the order of the judge in vacation extending the time for the filing of such bill; therefore, following the uniform rulings of this court that after the expiration of the time given by the court in which to file a bill of exceptions, neither the judge in vacation nor the court at a subsequent term of court has the power to extend the time for the filing of such bill of exceptions, it must be held that there is nothing before this court for review in the case at bar except the record proper. In *State v. Gartrell*, 171 Mo. l. c. 505, it was said that, "again and again it has been decided by this court that when the period (beyond the trial term) granted by the court in which to file a bill of exceptions has expired, neither the court nor the judge in vacation can extend it, and what purports to be a bill of exceptions filed in pursuance of such a void order will not be considered by this court." [*State v. Apperson*, 115 Mo. 470; *State v. Mosley*, 116 Mo. 545; *Danforth v. Railroad*, 123 Mo. 196; *State v. Chain*, 128 Mo. 361; *Powell v. Sherwood*, 162 Mo. 605.]

Directing our attention to the only question before us for review, that is, the record proper, it is sufficient to say that we have carefully examined the information upon which the judgment in this cause rests, and find that it properly charges the offense of murder of the first degree. However, counsel for appellant, in their brief, challenge the sufficiency of the information and suggest that there are two counts in the information and that the first count does not conclude "against the peace and dignity of the State." Learned counsel for appellant doubtless are laboring under a misapprehension of the true and correct interpretation of the information, for it is apparent there is but one count in which John Granger and James D. Granger are charged with the killing of one Mart Hopkins. The first part of the information charges that John Granger actually did

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the shooting, and then follows in the other portion of the information the appropriate and essential allegations charging James D. Granger as accessory before the fact, and then the information concludes "and the prosecuting attorney of the county and State aforesaid, upon his oath aforesaid, does say that Jno. Granger and Jas. D. Granger, him, the said Mart Hopkins, at the time and place aforesaid, in the manner and by the means aforesaid, feloniously, on purpose, wilfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder, against the peace and dignity of the State."

It is further suggested that the information is defective on account of the abbreviation of the name of John by use of the letters "Jno." There is no merit in the contention of appellant's counsel as to the sufficiency of the information charging the offense. The crime is charged in proper form and the information is duly verified in conformity to the statute. Formal arraignment of the defendant was waived and the trial proceeded, which seems to have been in every particular regular. The verdict of the jury finding the defendant guilty of murder of the second degree and assessing his punishment at ten years imprisonment in the penitentiary is in due form, as well as the sentence and judgment in accordance with such verdict.

Finding no reversible error in the record proper, which is the only matter before us for review, the judgment of the trial court should be affirmed, and it is so ordered.

All concur,

THE STATE v. MICHAEL MCGINNIS, Appellant.

Division Two, May 14, 1907.

NO BILL OF EXCEPTIONS. Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed.

Appeal from Jackson Criminal Court.—*Hon. Jno. W. Wofford*, Judge.

AFFIRMED.

Michael McGinnis pro se.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

Where there is no bill of exceptions, and no error appearing in the record proper, the judgment will be affirmed. *State v. Nicholas*, 193 Mo. 214; *State v. Sparks*, 191 Mo. 162.

GANTT, J.—On the 24th of February, 1905, the prosecuting attorney of Jackson county, Missouri, filed an information containing two counts, the first of which charged the defendant and others with forging a certain deed purporting to convey real estate in said county, and the second count of which charged the defendant and others with causing to be forged a certain deed purporting to convey real estate in said county.

At the April term, 1906, the defendant, who had been granted a severance, was tried and convicted and his punishment assessed at ten years in the penitentiary. Within due time, the defendant filed a motion for new trial, which was overruled on the 25th of June, 1906, and he was sentenced to the penitentiary in accordance with the verdict of the jury. On the same day

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he was granted an appeal to the Supreme Court and given ninety days in which to file a bill of exceptions. No bill of exceptions was filed in the criminal court within the time allowed, nor, for that matter, at any time. The only matter before us on this appeal is the record proper.

The defendant was convicted under the second count in the information, that is to say, of feloniously causing a certain deed to be forged. The prosecution was based upon section 1094, Revised Statutes 1899, and the information is sufficient. It is in the form often approved by this court. [State v. Fisher, 65 Mo. 437; State v. Tobie, 141 Mo. l. c. 554, 555.] The arraignment, trial and conviction all appear in regular form and the judgment must be and is affirmed.

Fox, P. J., and Burgess, J., concur.

THE STATE v. WALTER WILLIAMSON,
Appellant.

Division Two, May 14, 1907.

ASSAULT WITH INTENT TO KILL: Shooting At One, Hitting Another. The gravamen of the offense of assault with intent to kill, is the intent with which the shot was fired. And where defendant is charged with felonious assault upon D., and the evidence shows that he shot at W. and the shot took effect upon D., he can not be convicted of assault with intent to kill D.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds, Judge.*

REVERSED.

Thomas B. Harvey for appellant.

The court should have sustained defendant's motion for a new trial, one ground of which was that the verdict was against the evidence. Exception was preserved to the action of the court in overruling said motion. Shooting with intent to kill Woehrle will not sustain a charge of shooting with intent to kill Dorn, simply because the shot took effect upon Dorn. *State v. Mulhall*, 199 Mo. 202.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

It is earnestly insisted by counsel for appellant that this case should be reversed and remanded on the authority of the case of *State v. Mulhall*, 199 Mo. 202. But in that case, the judgment was reversed because of the giving of an erroneous instruction—an instruction which submitted the case to the jury on the theory that the intent followed the bullet, in a case of assault with intent to kill. In the case at bar, the record is in the same shape as if it contained no instructions; no objections or exceptions to the instructions having been saved. This court will, therefore, presume that the instructions properly declared the law to the jury; the law applicable to the charge contained in the information. There was sufficient evidence in this case to justify the jury in finding that the defendant shot with intent to kill Dorn; the pointing of a loaded pistol at him, the firing of the pistol and the striking and wounding of Dorn certainly made out a *prima-facie* case. The fact that one or two witnesses gave it as their opinion that the defendant was shooting at another person did not establish that fact conclusively; neither did it take from the jury the right to convict the defendant, if the jury believed from the rest of the evidence that the defendant shot with intent to kill Dorn. The higher court will presume that the trial court properly in-

structed the jury, and will also presume that the jury properly convicted the defendant, in the absence of showing to the contrary. In other words, he who asserts error, must prove error. *State v. Hunter*, 170 Mo. 440.

BURGESS, J.—Upon an information filed by the assistant circuit attorney of the city of St. Louis, in the circuit court of said city, charging the defendant with an assault with intent to kill one Elmer Dorn, the defendant was convicted and his punishment assessed by the jury at imprisonment in the penitentiary for five years. The defendant in due time filed motions for new trial and in arrest of judgment, which were overruled. His sentence was afterwards commuted to three years imprisonment in the penitentiary, and judgment passed accordingly. Defendant appealed.

The information, omitting the formal parts, is as follows:

“Richard M. Johnson, assistant circuit attorney, in and for the city of St. Louis, aforesaid, within and for the body of the city of St. Louis, on behalf of the State of Missouri, upon his official oath, information makes as follows: That Walter Williamson on the twenty-second day of April, in the year of our Lord, one thousand nine hundred and five at the city of St. Louis aforesaid, with force and arms, in and upon one Elmer Dorn feloniously, wilfully, on purpose and of his malice aforethought, did make an assault; and the said Walter Williamson with a certain weapon, to-wit, a pistol loaded with gunpowder and leaden balls, then and there feloniously, wilfully, on purpose and of his malice aforethought did shoot off, at, against and upon the said Elmer Dorn then and there giving to the said Elmer Dorn in and upon the head and body of him the said Elmer Dorn with the pistol aforesaid, one wound,

with the intent then and there him the said Elmer Dorn feloniously, wilfully, on purpose and of his malice aforethought to kill; contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The evidence on the part of the State tended to prove that the prosecuting witness, Elmer Dorn, was a newsboy, ten years old, and that on the 22nd day of April, 1905, he was near the corner of Twenty-first street and Franklin avenue, St. Louis, selling newspapers, when the defendant, who was disputing with another man at the corner of said streets, drew a pistol and fired twice, one of the bullets striking Elmer Dorn in the knee. Thomas M. Sayman, a witness for the State, testified that he was driving along the street in a buggy, and, upon hearing the report of a pistol, looked up and saw the defendant fire two or three shots at another man, whose name was Ed. Woehrle. Witness did not notice the boy, Elmer Dorn, at all, and only learned some two hours afterwards that the boy had been struck by one of the bullets. After the shooting, which occurred between six and seven o'clock in the evening, the defendant ran north on Twenty-first street dodged into an alley and disappeared. The evidence showed that the wounded boy was confined in a hospital for about four weeks, and remained in bed some two weeks longer after he had been taken home.

Only the defendant explained the cause of the difficulty. He testified that he was at Hannibal, Missouri, engaged at his occupation as foreman of a shoe factory, and received a letter from a friend giving him some information about his wife, living in St. Louis. Thereupon he returned to St. Louis, where he resided, and found a number of letters in a wardrobe, which caused him to look for the said Woehrle. He also discovered that a little iron bank or box, containing over thirty dollars in money, was missing, and that it was

in the possession of Woehrle. Defendant met Woehrle on the street and told him to return the bank. Woehrle at first denied having it, but afterwards told the defendant that he would go to his house for the bank, and asked defendant to meet him at the corner of Twenty-first and Franklin avenue, where he would deliver the bank to him. That a short while thereafter he met Woehrle at the appointed place, when the latter cursed him, and thrust his hand in his pocket as if reaching for a pistol, and that thereupon he (defendant) pulled out his pistol and fired at Woehrle. A day or two after the shooting, the defendant went to Chicago, where he remained about four weeks, and then returned to St. Louis and gave himself up.

The only question presented by this appeal is as to whether there was any substantial evidence to support the verdict. This point was raised by the motion for a new trial, and is now insisted upon in this court.

In order to convict the defendant of the crime charged in the information in this case, it devolved upon the State to prove that he shot at Elmer Dorn with intent to kill him; not that he shot at Woehrle, and that the shot took effect upon Dorn. [State v. Mulhall, 199 Mo. 202.] The gravamen of the offense was the intent with which the shot was fired; and it is clear from the evidence that the defendant did not intend to shoot Dorn, for there is no evidence that he even saw him at the time he fired the shot which entered his leg.

There is, we think, an entire failure of evidence to support the verdict, and the judgment should, therefore, be reversed and the defendant discharged. It is so ordered. All concur.

THE STATE v. WARREN LIBBY, Appellant.

Division Two, May 14, 1907.

1. **APPEALS: Overruling Motion for New Trial: No Exception.** Where the record shows that appellant failed to preserve by bill of exceptions any exception to the action of the court, in overruling the motion for new trial, there is nothing for the appellate court to review except the record proper.
2. **BILL OF EXCEPTIONS: Amendment: By Consent: New Trial: Nunc Pro Tunc Entry.** When a bill of exceptions is filed, it becomes a part of the record of the court, and can only be changed or amended by a *nunc pro tunc* entry correcting the record. It can not be amended, by consent of defendant's counsel, the prosecuting attorney, and the judge who tried the case, so as to show an exception saved to the overruling of the motion for new trial; nor is the suggestion of the trial judge that it is usually understood that an exception is taken when a motion for new trial is overruled, sufficient ground for a *nunc pro tunc* entry correcting the record.

Appeal from Laclede Circuit Court.—*Hon. Argus Cox*,
Judge.

AFFIRMED.

Don O. Vernon and *J. T. Moore* for appellant.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

There is nothing before the court except the record proper. The so-called bill of exceptions fails to show that any exceptions were saved to the overruling of defendant's motion for a new trial. So, even if the transcript of the evidence can be termed a bill of exceptions, mixed up as it is with the record proper, defendant is not entitled to have any of the alleged errors considered by this court. *State v. Irvin*, 171 Mo. 558; *State v. Reed*, 89 Mo. 168.

FOX, P. J.—This cause comes to this court upon appeal by defendant from a judgment of the circuit court of Laclede county, convicting him of feloniously and wilfully maiming and wounding one W. F. Parker. The record discloses that the appellant failed to preserve by bill of exceptions any exception to the action of the court in overruling his motion for a new trial; therefore, there is nothing before the court to review except the record proper. However, it is suggested that the bill of exceptions may be amended by agreement between the prosecuting attorney, and the counsel for the appellant, and we have on file before us letters from defendant's counsel and from the prosecuting attorney and the judge who tried the case, suggesting this amendment. It is sufficient to say of this suggestion that a bill of exceptions filed and made a part of the record cannot be amended by consent. Such bill of exceptions, when filed in the circuit court of Laclede county, became as much a part of the record proper of that court as any other entry made upon the records by the clerk of the court during any term of such court, and such bill of exceptions can only be changed or amended by a *nunc pro tunc* entry correcting such record, and the rule is well settled that, in order to justify the making of a *nunc pro tunc* entry correcting or amending a record, the record must in some way show, either from the judge's minutes, the clerk's entries, or some paper in the cause, the facts authorizing such entries. No such entries can be made from the memory of the judge, nor on parol proof derived from other sources. [State v. Jeffers, 64 Mo. l. c. 378; Bank v. Allen, 68 Mo. l. c. 476; Belkin v. Rhodes, 76 Mo. l. c. 650; Saxton v. Smith, 50 Mo. 490; Fletcher v. Coombs, 58 Mo. l. c. 434; Wooldridge v. Quinn, 70 Mo. 370; Blize v. Castlio, 8 Mo. App. l. c. 294; Evans v. Fisher, 26 Mo. App. l. c. 546.] Judge BURGESS in Ross v. Railroad, 141 Mo. l. c. 395, citing the authorities to support the an-

nouncement of the rule, said: "It has been uniformly held by this court that unless an exception be taken and preserved by bill of exceptions to the action of the court in overruling a motion for a new trial, there is nothing before the Supreme Court for review, save and except the record. [State v. Murray, 126 Mo. 529; State ex rel. Dopkins v. Hitchcock, 86 Mo. 231; Wilson v. Haxby, 76 Mo. 345; Danforth v. Railroad, 123 Mo. 196; State v. Harvey, 105 Mo. 316; McIrvine v. Thompson, 81 Mo. 647; State v. Marshall, 36 Mo. 400.]"

The suggestion as to the amendment in the form of letters, as heretofore stated, furnishes no basis for the change or amendment of the bill of exceptions, and in fact the letter of the judge of the circuit court clearly indicates that there is no such condition of the record of the circuit court in Laclede county in respect to the filing of this bill of exceptions which would authorize the court to make a *nunc pro tunc* entry in respect to the exceptions to the action of the trial court in overruling the motion for a new trial, for it is suggested by Judge Cox, who tried the case, that the amendment or change of the record should be made for the reason that it is usually understood, when a motion for new trial is overruled, that an exception is taken. This would fall far short of furnishing sufficient grounds for a *nunc pro tunc* entry correcting this record; therefore, we see no escape from the conclusion, there being no exceptions properly preserved to the action of the court in overruling the motion for a new trial, that the only thing to be considered by this court is the record proper. The conclusion reached upon this proposition is fully supported by the clear announcement of the rule in State v. Gartrell, 171 Mo. l. c. 504. It was there said by this court, speaking through Judge GANTT, that "it is the settled law of this State that during the whole of the term in which any judicial act is done, the proceedings

are considered *in fieri*, and this applies even to adjourned sessions of the same term, and the record remains, so to speak, in the breast of the judge or judges of the court, and hence is subject to amendment or alteration as he or they may direct, but after the lapse of the term, or its final adjournment, the judge has no power to change the record further than by *nunc pro tunc* entries to make the record speak the exact truth of that which actually did occur during the term, and *then only* when there is sufficient record or minutes of the judge or clerk to authorize such amendment, as it has been repeatedly ruled by the court that such corrections can not be made 'from outside evidence or from facts existing alone in the breast of the judge, after the end of the term at which the final judgment was rendered.' [Ross v. Railroad, 141 Mo. 390; Saxton v. Smith, 50 Mo. 490; Dunn v. Raley, 58 Mo. 134; Fletcher v. Coombs, 58 Mo. 430; Jones v. Hart, 60 Mo. 356; Crawford v. Railroad, 171 Mo. 68.]''

Giving our attention to the examination of the record proper, we find that the amended information filed charges the offense of which the defendant was convicted substantially in such form as has heretofore met the approval of this court; the information, in conformity to the statute, was duly verified by the prosecuting attorney; the record discloses the formal arraignment of the defendant and plea of not guilty; then follows, as recited by the record, the trial of the cause by the jury, which appears in every particular to have conformed to the requirements of the statute. The verdict of the jury is in proper form and was returned into court finding the defendant guilty as charged and assessing his punishment at imprisonment in the county jail for three months and a fine of one hundred dollars. The judgment entered of record in accordance with the verdict is in due form.

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The record being the only matter before us for review, and finding no error in it, the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

THE STATE v. HARRY HOWARD, Appellant.

Division Two, May 14, 1907.

1. **BURGLARY: Sufficiency of Evidence.** Evidence held sufficient to support a conviction of burglary.
2. **BURGLARY AND LARCENY: Conviction of Former.** Where defendant is charged with burglary and larceny, the jury may find him guilty of the burglary alone, although the evidence also abundantly establishes the larceny.
3. **ARREST: Warrant: Immaterial.** Whether or not the police officer had a warrant for defendant's arrest at the time he broke into defendant's house and discovered the stolen property in his possession, is immaterial in this prosecution of defendant for burglary and larceny.
4. **APPEALS: Improper Examination: General Assignment.** An assignment that the court erred in permitting the prosecuting attorney to ask immaterial, impertinent and insolent questions, is too general to call for consideration by the appellate court.

Appeal from Jackson Criminal Court.—*Hon. Jno. W. Wofford*, Judge.

AFFIRMED.

Philip D. Clear for appellant.

- (1) Error was committed by the jury in finding and the court in accepting a verdict for burglary alone.
- (2) Error was committed by the court in admitting evidence of officer Bowling that he, with a squad of police, broke open doors to defendant's home in the night and arrested defendant without a warrant, finding a lot of goods there which later on proved to be defendant's. The police did not even have information that a

misdeemeanor had been committed and that Howard was probably guilty of it. This would not have justified Howard's arrest without a warrant (*State v. Grant*, 79 Mo. 113; *In re Kellam*, 55 Kan. 700) even on the street.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

The finding of all of the stolen property in defendant's possession, the absurd way in which he attempted to account for the possession thereof, and his effort to escape from the officers, were circumstances which conclusively established the defendant's guilt. *Wills on Cir. Evid.*, pp. 69, 80 and 81; *Burrell on Cir. Evid.*, p. 452; 3 *Greenl. on Evidence*, sec. 33.

GANTT, J.—From a conviction of burglary in the criminal court of Jackson county at Kansas City, the defendant appeals.

The prosecution was commenced November 1, 1905, by information filed by the prosecuting attorney. The burglary for which defendant was prosecuted was committed on the 21st of October, 1905, by opening a transom in the building known as 509 West Eighth street, Kansas City. Miss Annabelle Beamguard rented and occupied a room in this house and worked for a restaurant near by. Her custom was to go to work about ten o'clock each morning and work until two-thirty in the afternoon. On the 21st of October, Miss Beamguard had in this room a black suit, a silk petticoat and a grip, with her initials on it, which were of the value of thirty-five dollars. When she went to work that morning, she locked her door and window and when she returned in the afternoon, she found the door and window still locked but the transom up. She identified her clothing and satchel in the possession of the police, and they were offered in evidence on the trial. The evidence on the part of the State tended to show that the

defendant was seen that day in the neighborhood of this building, running. The grip bag was found in a pawnshop in Armourdale, Kansas, pursuant to information given to the police officer by the defendant three or four days after the burglary. The pawnbroker testified that the defendant came to his shop on the 21st of October, and pawned this grip for fifty cents, and gave his name as Brown. The initials had been scratched off. Police officer Bowling testified that about half past nine or ten o'clock at night, a day or two after the burglary, he and other officers went together to the place where the defendant was staying; that they surrounded the house, knocked at the front door and demanded admission. There was a light in the house and someone inside asked "who was there," the officer replied, "Chief of police, who wanted to speak to Mr. Howard," and immediately the lights were turned out. After various efforts to get the parties within the house to open the door, the officer finally caused the door to be broken open, and as they did so, someone started to go out of the side door, and the officer hurried to that door and found the defendant with his overcoat and hat on. In this room where the defendant was, was found some lady's clothes, which belonged to Miss Beamguard. The defendant said he had bought this suit in St. Joseph about two weeks before. The evidence further tended to show that the defendant and a Miss Darling were living in this house at the time it was raided by the police. On the part of the defendant the evidence tended to show that he and Miss Darling occupied different rooms, though very friendly with each other; that the defendant purchased a silk petticoat and a dress in St. Joseph sometime prior to this burglary and gave the same to Miss Darling. Miss Darling testified that defendant pawned a watch in order to raise some of the money necessary to pay for these clothes. Another witness for the defendant testi-

fied to seeing a man with these clothes trying to sell them down at the stock yards, and that he went to see the defendant for the purpose of trying to make a sale; he also had a valise, which answered the description of the one stolen from Miss Beamguard's room.

The information is in proper form and no objection is made to it by the defendant. The court instructed fully on the facts necessary to constitute burglary and also instructed fully upon the presumption arising from the recent possession of stolen property. The court also gave the usual instructions on the presumption of innocence, reasonable doubt and the credibility of witnesses, and refused the following instruction asked by the defendant: "The court instructs the jury that if you find from the evidence that the officer, Bowling, who made the arrest of the defendant in his house, had no warrant for the defendant, and did not know that defendant had committed a felony, then you will consider the evidence relative to breaking in defendant's house, because defendant did not come out of the house."

Various errors are assigned to reverse the judgment.

1. As to the objection that the testimony was insufficient to establish a burglary, the evidence, viewed in the light of the presumption of guilt from recent possession of stolen property, was amply sufficient to justify a conviction. The stolen goods were fully identified by the owner and were shown to have been safely deposited in her room when she went to work at ten o'clock, and were found in the possession of the defendant on the succeeding night and a portion of them had been pawned by him on the very afternoon that the room of Miss Beamguard had been burglarized. The explanation given by the defendant and his witnesses of his possession of these goods was entirely a matter for the jury, and that they did not accept his story of

how he acquired them is evident from their verdict. [State v. James, 194 Mo. 268.] That the jury could find the defendant guilty of burglary and fail to find him guilty of larceny, there can be no doubt, even though the testimony abundantly established the larceny as well as the burglary.

2. The learned counsel for the defendant has devoted much time both in the oral argument and in his brief to his objection that the police officers had no warrant to arrest the defendant at the time they entered his house and discovered the stolen property in his possession. There is no issue of unlawful arrest or false imprisonment involved in this case. Whether or not the officer exceeded his lawful powers in breaking into the house in which he found the defendant in possession of the stolen property of Miss Beamguard, is wholly immaterial for the purposes of this case. The material facts which this evidence disclosed were the finding of the stolen goods in the possession of the defendant and his explanation of how he came by them. His story was that he had bought them in St. Joseph at a second-hand store three weeks before the night they were found in his possession. The objection that the officer had no warrant was without merit so far as the issues in this case were involved.

3. It is next insisted that the court erred in permitting the prosecuting attorney to ask immaterial, impertinent and insolent questions. Not only is this assignment too general to call for a discussion by this court, but we have read the whole evidence and we find no reversible error on this account.

4. Finally, it is insisted that the remarks of the prosecuting attorney were such as to grievously prejudice the rights of the defendant. We have carefully read the remarks attributed to the counsel for the State in connection with the evidence in the cause and we find no such deviation from the evidence as to bring

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this case within that class in which we have reversed causes on account of the conduct of the prosecuting attorney. As already said, the stolen goods were shown to have been in the possession of the defendant on the very afternoon that Miss Beamguard's room was burglarized. The defendant himself did not testify or make any explanation of how he came into possession of these goods, but among others he called as a witness James Ellis, who was at the time a prisoner under sentence for burglary, and whose testimony shows him to have been engaged in burglary and thefts as a regular vocation. The only other witness called by the defendant was the young woman with whom he was living without being married to her.

It is sufficient to say that the explanation of these two witnesses of the manner in which defendant came into possession of this stolen property was so utterly unreasonable as to call for the severest criticism by the counsel for the State. A careful examination of this whole record discloses no substantial error, but on the contrary it would have been strange had the jury reached any other conclusion than the one they did. The judgment is affirmed.

Fox, P. J., and Burgess, J., concur.

THE STATE v. PETER WALSH, JR., Appellant.

Division Two, May 14, 1907.

1. **INFORMATION: Fraudulent Registration.** An information, set out in the statement, charging fraudulent registration in an election precinct, *held* invalid, on the authority of State v. Keating, 202 Mo. 197.
2. **FRAUDULENT REGISTRATION: Residence: Hearsay Evidence.** It was error to permit a witness for the State to testify, in rebuttal, over defendant's objection, to a conversation witness had, in defendant's absence, with a lady at a certain number and street, in which conversation she stated that de-

defendant lived there. This was the merest hearsay, and was all the more prejudicial because introduced in rebuttal.

3. ———: Insufficiency of Evidence. Evidence examined and held insufficient to support a conviction of fraudulent registration.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

REVERSED.

Alphonso Howe for appellant.

(1) The information, particularly the second count, is defective in that it charges that defendant did not reside, etc., "nor in said precinct." The statute permits registration when one has commenced to reside. The information makes no distinction between right to register and right to vote. It fails to allege that the ninth precinct of the second ward was an "election precinct," or that the defendant "personally" applied for registration, or that he was "sworn" or that he "affirmed" before one of the judges to answer questions, or that he applied in person for registration before the "precinct board of registration," or that defendant signed his name to the "original book of registry," etc., or that the defendant had no "lawful" right to register in said precinct. *Laws 1903, p. 177, sec. 11; State v. Meysenberg, 171 Mo. 1; State v. Miller, 132 Mo. 297; State v. Etchman, 184 Mo. 193; State v. Kyle, 177 Mo. 659; State v. Hagan, 164 Mo. 654; State v. Keating, 202 Mo. 197.* (2) The court erred in refusing to give defendant's instruction in the nature of a demurrer at the close of the State's case. There was no proof of fraudulent registration. (3) The court erred in permitting witness Bigemann to testify as to conversation with the middle-aged lady at 3129 North Twelfth street to the effect that Peter Walsh, Jr., lived there and in refusing to strike out the incompetent testimony after it was given. Defendant was not present and certainly

could not be bound by what some third party would say.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) The information, which was accompanied by the affidavit of the circuit attorney, is sufficient in form and substance. (2) There was substantial evidence of defendant's guilt. It was clearly shown that he registered in a ward and precinct where he did not reside; in fact, this was conceded by him at the trial. The only excuse offered by him for this conduct was that he made up his mind to change his residence, and that this mental condition was brought about on the registration day, after he had already registered in the precinct where he resided. Without notifying any of the city officers of his intention to move, and without even asking to have the registration books corrected, he suddenly concluded to remain where he then resided. It is a singular fact, however, that the defendant selected his father's place where he falsely registered, and that his father had the same name as defendant, and that others were in the habit of falsely registering from that place. And defendant's father, who testified to defendant's intentions, is the same person who has signed the bonds of others who have been charged and convicted of false registration, and who falsely stated that they resided at the home of defendant's father. It may well be said that the defense interposed was worse than no defense, and materially aided the State in making a strong case against the defendant. The evidence of defendant's guilt was positive and sufficient to convince even the most skeptical. And, where there is substantial evidence of his guilt, the judgment will be affirmed by this court. . *State v. Smith*, 190 Mo. 706; *State v. Payne*, 194 Mo. 442; *State v. Groves*, 194 Mo. 452; *State v. Williams*, 186 Mo. 128;

State v. Williams, 149 Mo. 496; State v. Swisher, 186 Mo. 8.

BURGESS, J.—On the 19th day of September, 1905, the circuit attorney of the city of St. Louis filed an information, duly verified, in two counts, the first of which charged the defendant with unlawfully, feloniously, knowingly and fraudulently registering in two election precincts in St. Louis on the same day, the second count of the information charging that the defendant unlawfully and fraudulently registered in a precinct in which he did not reside. At the December term, 1905, of the circuit court of said city the defendant was tried and convicted under the second count of the information, and his punishment assessed at imprisonment in the penitentiary for two years. Defendant's motion for new trial and in arrest being overruled, he appealed.

The said second count of the information is as follows:

“And said Arthur N. Sager, circuit attorney, within and for the city of St. Louis (said city comprising the Eighth Judicial Circuit of the State of Missouri) as aforesaid, now here in court, on behalf of the State of Missouri, further information makes, that in the city of St. Louis, on the nineteenth, twentieth, twenty-first and twenty-second days of September, one thousand nine hundred and four, a general registration of voters, under the laws of the State of Missouri, was held in the said city of St. Louis, and in every ward and precinct of said city of St. Louis (said city of St. Louis being then and there a city having more than three hundred thousand inhabitants) and in the ninth precinct of the second ward of said city of St. Louis by and before the duly appointed and acting judges, clerks and officers of registration of said precinct and ward; and that Peter Walsh, Jr., on the said nineteenth

day of September, one thousand nine hundred and four, at the said city of St. Louis, in the said ninth precinct of the second ward, before the said duly appointed, qualified and acting judges and clerks of registration of said precinct, unlawfully, feloniously, knowingly and fraudulently did register as a qualified voter of said precinct and then and there give to the said judges and clerks of election of said precinct, who were then and there acting as officers of registration, his name as Peter Walsh, Jr., and his residence as No. 3129 North Twelfth street, in said precinct, and then and there request said officers of registration to then and there write the name of him, the said Peter Walsh, Jr., upon the registers, poll-books and books of registration of said precinct and to enter the residence of him, the said Peter Walsh, Jr., upon said books, as No. 3129 North Twelfth street in said precinct as a qualified voter of said precinct, having the right to register and vote in said precinct, and the said judges and clerks of registration of said precinct aforesaid, then and there did enter upon the registers, poll-books and books of registration of said precinct the name of the said Peter Walsh, Jr., as residing at No. 3129 North Twelfth street, and as being a qualified voter, having the right to register and vote in said precinct, and he, the said Peter Walsh, Jr., then and there feloniously, wilfully, knowingly, unlawfully and fraudulently did write his name upon the said registers, poll-books and books of registration of said precinct as a qualified voter having the right to register and vote in said precinct by then and there writing the signature and name, Peter Walsh, upon said books in the margin provided for the signature of qualified voters when registering; whereas, in truth and in fact the said Peter Walsh, Jr., then and there did not reside at No. 3129 North Twelfth street, nor in the said precinct

and had no right to register in said precinct as he, the said Peter Walsh, Jr., then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The State's evidence tended to show that a general registration of voters was held in the city of St. Louis on the 19th day of September, 1904, and in the twelfth precinct of the seventeenth ward, and in the ninth precinct of the second ward in said city. That on said day the defendant appeared before the judges and clerks of registration at the polling place in the twelfth precinct of the seventeenth ward, was sworn, and his name entered in the registration book as a qualified voter, the defendant giving his name as Peter Walsh, and his address as 2341 Madison street; that on the same day defendant in like manner registered as a qualified voter in the ninth precinct of the second ward, except that his name was entered as Peter Walsh, Jr., and his residence as 3129 North Twelfth street. In support of the above facts the State introduced in evidence four books identified as the books used by the judges and clerks at said election precincts during the registration held on said 19th day of September. It also appeared from the evidence that defendant's father, whose name was Peter Walsh, lived at 3129 North Twelfth street.

The defendant testified in his own behalf that he was born in St. Louis, and lived there all his life; that he was a police officer and had been such for six years; that he was married in February, 1904, and at the time of his marriage was living at No. 3129 North Twelfth street in his father's house, and had lived there with his father about sixteen years; that after his marriage he lived there until the 1st of April, 1904, when he moved to 2341 Madison street. His wife wanted him to get a house close to where her mother lived on that

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street, as he worked at night every three months; that in the police department they have two off-days a month, and the 19th day of September was one of his days off duty; that about 11 o'clock in the morning he registered in the twelfth precinct of the seventeenth ward, from 2341 Madison street, and then visited his father at 3129 North Twelfth street. He said it was his custom to go to his father's house every day he was off duty; that on this day his father spoke to him about coming to live with him, and that he (defendant) said all right; that he had been speaking to his wife about it before, and said, "I think I could get her to come down now, because she is awful lonesome now, I am so many nights away." That he told his father that he would come, and also stated to him that he had registered. His father told him, he said, that it would be no harm to register in the precinct in which he lived, and that he could have his name scratched off in the seventeenth ward. That about seven o'clock that evening he registered in the ninth precinct of the second ward, intending at the time to move to his father's house and vote in that precinct; that he did not move to his father's house nor did he vote in that precinct; that he did not have his first registration scratched out because he did not think it necessary. The original registration book of ward 2, precinct 9, was introduced in evidence showing that defendant's second registration from 3129 North Twelfth street, in the second ward, was scratched out, and the words "erased, yes," and "no vote" entered.

Defendant's wife testified to the expressed desire and intention of her husband to move to his father's residence, but stated that she refused to go, as she wanted to live near her mother who resided at 2308 Madison street.

Peter Walsh, defendant's father, testified that at his solicitation defendant agreed, on September 19, to

move to his house, but that he did not do so. That defendant told him that he had registered in the ward in which he was then living, and that he said, "Peter, I don't think that makes any difference; may be you do not get off easily again; you can get your name rubbed off up there."

Defendant's good reputation for veracity, honesty, integrity and good citizenship in the community in which he lived was testified to by a number of citizens who were long acquainted with him.

The State, in rebuttal, introduced August Bigemann, who testified that about three days after the registration, while canvassing the votes of the precinct in which the elder Peter Walsh lived, he went to his house, No. 3129 North Twelfth street, and asked who lived there, and that a middle-aged lady living there, whose name he did not know, in answer to his question, said that Peter Walsh, Jr., lived there.

At the close of the evidence, the defendant asked the court to give the following instruction:

"The court instructs the jury that, under the evidence in this case, the defendant had a lawful right to register as a qualified voter, residing at No. 2341 Madison street, in the twelfth precinct of the seventeenth ward, and such registration was legal and proper, as shown by the evidence. And if the jury further believe and find from the evidence in this case that the defendant thereafter decided to change his residence to No. 3129 North Twelfth street, in the ninth precinct of the second ward, and registered as a qualified voter from said number with an honest purpose and without fraudulent intent, believing at the time that he had changed his residence from No. 2341 Madison street to said No. 3129 North Twelfth street, and intending at the time to vote from there, then the jury, if they so find, will acquit the defendant. And if the jury have a reasonable doubt in the premises as to whether or not

defendant had a fraudulent intent in so registering, they will likewise acquit the defendant."

The court refused to give the said requested instruction, and defendant duly excepted.

This prosecution is based upon section 2120j, Laws 1903, p. 155, and the information is substantially like that in the case of State v. Keating, 202 Mo. 197, and which was held to be invalid by this court. That case is decisive of this, and for the reasons therein stated the information in the case in hand must be held invalid.

Another error assigned by the defendant is the action of the court in permitting witness Bigemann, a witness for the State, to testify in rebuttal, over the objection of the defendant, to a conversation he had with a lady at No. 3129 North Twelfth street, some days after the registration, in which conversation she stated that Peter Walsh, Jr., lived there. This was the merest hearsay, and should not have been admitted. The defendant was not present at the time, and was not bound by any such statement. It was all the more prejudicial because in rebuttal.

The vital question in this case, however, is as to whether there is any substantial evidence to sustain the verdict.

The defendant was a police officer, and had been for six years, at the time of the trial. At the time of his marriage, on the 16th day of February, 1904, he was living at No. 3129 North Twelfth street, with his father, and had lived there for about sixteen years prior to his marriage. Defendant and his wife continued to live there until the first of April, when they moved to 2341 Madison street, defendant's wife wanting to be near her mother, who lived close by on the same street. About eleven o'clock in the forenoon of September 19, 1904, he registered as a qualified voter in the seventeenth ward, twelfth precinct, from 2341

Madison street, and then went to see his father at 3129 North Twelfth street. His father wanted him to move back to his house, and he agreed to do so. He then told his father that he had registered in the seventeenth ward, when the latter advised him to register in the precinct and ward in which he resided and have his name scratched off the registration books in the twelfth precinct of the seventeenth ward. The defendant accordingly registered that evening in the ninth precinct of the second ward, giving his residence as 3129 North Twelfth street, intending at that time to move there. He did not change his residence, however, his wife being reluctant to move away from her mother, and defendant did not, therefore, find it necessary to scratch off or erase his name from the registration books in the precinct and ward in which he then resided. There was no evidence contradictory of these facts. The defendant did not vote, nor attempt to vote, in the ninth precinct of the second ward, and the original registration book introduced in evidence showed that defendant's second registration from 3129 North Twelfth street, ninth precinct, second ward, was scratched out, and the words "erased, yes" and "no vote" entered. It does not appear from the evidence that the defendant practiced any deception whatever, or tried to conceal any fact in relation to the two acts of registration, and it seems clear that at the time of the second registration he acted in good faith, intending at the time to move to 3129 North Twelfth street. Defendant also showed a good reputation for truth, veracity, honesty, integrity and good citizenship in the community in which he lived.

Indeed, the State's evidence not only failed to prove any fraudulent intent on the part of the defendant in registering as a qualified voter from the ninth precinct of the second ward, but it failed absolutely to

show that the defendant did not in fact reside at No. 3129 North Twelfth street, in said ward and precinct, at the time of said registration. The two sets of registration books introduced in evidence afforded no stronger proof that the defendant resided at 2341 Madison street than they did that he resided at 3129 North Twelfth street, so that, for the purpose of showing his real residence, they were valueless. It is true that witness Tibbles, one of the clerks of registration in the twelfth precinct of the seventeenth ward, testified that defendant, *at the time he registered there*, was living at 2341 Madison street; but witness Schoenbeck, one of the judges of registration in the ninth precinct of the second ward, when asked if he knew where defendant resided *at the time he registered from 3129 North Twelfth street*, answered, "No, sir." These were the only witnesses for the State who testified as to the defendant's residence. Although the defendant did reside at 2341 Madison street at the time he registered in the seventeenth ward, it was quite possible for him to move to 3129 North Twelfth street the same day and register in the second ward, for, according to the defendant's evidence, which was not contradicted, about eight hours had elapsed between the time of the first registration and the second. It devolved upon the State to prove by competent evidence its charge that the defendant fraudulently registered as a qualified voter in a precinct in which he did not reside, which the State wholly failed to do. But for the evidence on the part of the defendant, there would be no way of telling where in fact the defendant did reside at the time he registered as a qualified voter in the ninth precinct of the second ward.

The record is barren of any substantial evidence tending to prove the defendant guilty of the criminal act intended to be charged in the information, and we

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do not think the verdict should be permitted to stand. We, therefore, reverse the judgment, and discharge the defendant. All concur.

THE STATE v. A. M. DAVIS, Appellant.

Division Two, May 14, 1907.

1. **CHANGE OF VENUE: Application Properly Overruled.** When the case was called for trial, the State announced ready, but defendant asked for time in which to prepare an application for a continuance, which was granted. While waiting for the supposed application for a continuance, the court learned that defendant was preparing an application for a change of venue, whereupon the court called the case for trial, and so notified the defendant, who, after the jury were sworn upon their *voir dire* and the State had finished its examination of the jurors, filed his application for a change of venue. *Held*, that the application was properly overruled.
2. **INSTRUCTION: Time When Offense Committed: Error in Defendant's Favor.** An instruction which limits the time within which the jury might find the offense to have been committed, to the year 1906, instead of within three years prior to the date of the filing of the information, though erroneous, is an error in defendant's favor, of which he cannot complain.
3. **GAMBLING: Crap Table: Sufficiency of Evidence.** Evidence held sufficient to support the verdict finding defendant guilty of setting up and operating a crap table for the purpose of playing games of chance for money and property.

Appeal from Jasper Circuit Court.—*Hon. Howard Gray*, Judge.

AFFIRMED.

Clay & Sheppard and *M. R. Lively* for appellant.

(1) When the defendant filed his application for a change of venue from the trial judge, he had no further jurisdiction in the case. *R. S. 1899, sec. 2594; State v. Shipman, 93 Mo. 147; State v. Greenwade, 72 Mo. 304.* (2) The court erred in giving instruction 2.

Under this instruction, if the jury should have found from the evidence that the defendant, in the county of Jasper and State of Missouri, set up and operated a certain gambling device, etc., just so it was prior to the 26th of February, 1906, they could find him guilty. The time should have been limited to three years previous to the time of filing the information.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) No error was committed by the trial court in overruling defendant's application for a change of venue. It is hardly necessary to argue that this application came too late, especially as no notice was given to the State's counsel. (2) The evidence, and all the evidence, showed that the crime charged was committed during the month of February, 1906, and prior to the filing of the information, which was February 26, 1906. So the jury could not possibly have been misled; neither was it possible for the defendant to have been convicted of any crime committed prior to the time limited by the statute in such cases.

FOX, P. J.—From a judgment of the circuit court of Jasper county, Missouri, convicting him of setting up, keeping and operating a certain table and gambling device, commonly called a "crap table," devised and designed for the purpose of playing games of chance for money and property, defendant appeals. On February 26, 1906, the prosecuting attorney of Jasper county filed an information, and on March 6, 1906, he filed an amended information, duly verified, charging that the defendant on the — day of February, 1906, feloniously did set up, keep and operate a certain table and gambling device, commonly called a "crap table," which table was adapted, devised and designed for the purpose of playing games of chance for money and

property. At the March term, 1906, of the Jasper Circuit Court, and at the convening of court on the 14th day of March, this being the first case on the docket for that day, the State, by W. N. Andrews, prosecuting attorney, announced ready for trial, but the defendant announced that he was not ready and asked the court to grant him time to prepare an application for a continuance. This request was granted. While waiting for the supposed application for a continuance, the court ascertained that the defendant was preparing an application for a change of venue, whereupon the court called the case for trial and so notified the defendant. The jury was sworn to answer questions and the State proceeded to make its examination and finished the same, when the defendant filed the following application and affidavits for a change of venue from the Hon. Howard Gray, the trial judge of the Jasper Circuit Court:

“State of Missouri, Plaintiff, vs. A. M. Davis, Defendant.

“IN THE CIRCUIT COURT OF JASPER COUNTY, MO.

“March Term, at Carthage, 1906.

“*Application for Change of Venue.*

“Comes now the defendant, A. M. Davis, and represents and shows to the court that he cannot safely proceed to the trial of said cause where it is now pending in Division No. One of said court, the Hon. Howard Gray, Judge, on account of the bias and prejudice of said Hon. Howard Gray, and that he cannot have a fair trial of said cause before said judge.

“Wherefore, he prays to have the change of venue as by law provided. A. M. DAVIS.

“State of Missouri, County of Jasper, ss.

“I, A. M. Davis, being duly sworn, upon my oath depose and say that I have read the foregoing application for change of venue, and that the matters and

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facts therein contained are true, and that the Hon. Howard Gray, Judge of Division No. One, is biased and prejudiced in said cause and I cannot have a fair trial of said cause before the Hon. Howard Gray.

"That said information of the bias and prejudice of the Hon. Howard Gray first came to this applicant since the adjourning of this court yesterday, Tuesday, the 13th day of March, 1906. A. M. DAVIS.

"Subscribed and sworn to before me this 14th day of Mch., 1906. A. F. CARMEAN, Clerk.

"(Seal.)

"By J. W. GRAY, D. C.

"State of Missouri, County of Jasper, ss.

"We, Bert Mann and Walter Miller, upon our oath depose and say that we have read and know the contents of the foregoing application for a change of venue, and that the same is true, and that we are residents and citizens of Jasper county, Mo., and are not of kin or counsel to the defendant.

"BERT MANN,

"WALTER MILLER.

"Subscribed and sworn to before me this 14th day of March, 1906. A. F. CARMEAN, Clerk.

"(Seal.)

"By J. W. GRAY."

The court overruled this application, and in doing so made the following order:

"Now comes the defendant and files herein his application for a change of venue in this case. By consent the same is taken up, and being seen, heard and fully understood by the court, the same is overruled." To which action of the court the defendant objected and excepted at the time.

Whereupon, the defendant examined the jurors and proper challenges being made, the case proceeded.

The testimony upon the part of the State tended to show that Sheriff Marrs, Deputy Sheriff Marquiss and Deputy Sheriff Keir raided a certain room in the second story over the Woodbine saloon in the city of Joplin on one Saturday night in the month of February, 1906. Prior to forcing their way into said room, these officers went up in an alley, climbed over a fence and got upon a flat roof of a one-story building and looked into the windows to see what was going on in said room. They saw a number of men up there, including the defendant, who were engaged in gambling. The defendant was standing behind a crap table, dealing craps, and several others were around the table on the outside, rolling two dice across the table. The defendant was paying the bets and cashing in the checks. The others were standing on the outside of the table and were placing their checks down on the table and rolling the dice. The table was identified by the officers as what is commonly termed a crap table, and was about four feet high with a railing around it about four or five inches high, and was eight feet long by three or four feet wide, and covered with a green cloth. On one side of the table, about the center thereof, there was a little space cut out, and in this space the defendant was standing while the game was in progress. On this table were numbers corresponding with numbers that can be made on a pair of dice, and on this particular table were 4, 5, 6, 8, 9 and 10. The word "come" was also printed on the table, and this word is one that is used by gamblers in playing said game of chance. Dice were also found on the table, and the defendant was seen catching the dice as others would throw them, and throwing them back to the player. The defendant was also seen dealing certain colored checks, round flat checks, which he gave in exchange for money. The officers further testified that the table which the defendant had charge of was the character of table devised, designed and made

for playing the game of craps, and was commonly termed a "crap table." The defendant also had a little ball, that looked like a half pool ball, which was used for some purpose, not explained by the evidence in this case.

The defendant offered no evidence.

At the close of the evidence the court instructed the jury and the cause being submitted to them they returned a verdict finding the defendant guilty and assessing his punishment at two years imprisonment in the State penitentiary. Motions for new trial and in arrest of judgment being overruled, judgment of sentence in accordance with the verdict was entered of record, and from this judgment the defendant in proper form and due time prosecuted his appeal to this court, and the record is now before us for review.

OPINION.

The record before us in this case discloses, as heretofore indicated by the statement of the case, but one legal proposition, that is, the propriety of the action of the trial court in overruling defendant's application for a change of venue. We have carefully considered the disclosures of the record upon this question. It is therein recited that, "at the convening of court on the said 14th day of March, 1906, this being the first case on the docket for that day, the State, by W. N. Andrews, prosecuting attorney, announced ready for trial, but the defendant announced that he was not ready and asked the court to grant him time to prepare an application for a continuance. This request was granted. While waiting for the supposed application for a continuance, the court learned and ascertained that the defendant was preparing an application for a change of venue, whereupon the court called the case for trial, and so notified the defendant. The jury was sworn to answer questions and the State proceeded to make its

examination, and finished the same, when the defendant filed the following application for a change of venue." We omit reproducing the form of the application, as it has heretofore been inserted in the statement of the cause.

We deem it only necessary to say, upon this assignment of error as disclosed by the record, that the action of the trial court in overruling the application for a change of venue was proper. Learned counsel for appellant rely upon the conclusions reached in *State v. Spivey*, 191 Mo. 87, as supporting the contention in the case at bar. An examination of the *Spivey* case will demonstrate a very clear distinction between that case and the case now under consideration. While in the *Spivey* case there was no previous notice given that an application for a change of venue would be made, yet upon the day that the case was called for trial counsel presented an application and the prosecuting attorney appeared and resisted it and introduced testimony in respect to it. In this case, it was called for trial and the State announced ready; counsel for defendant asked the court for a little time in which to prepare an application for a continuance. The court very readily granted the request, but it seems, as shown by the record, that counsel, instead of preparing an application for a continuance, were preparing an application for a change of venue. No notice or even an intimation on the part of counsel had been made that an application for a change of venue would be presented, and when the court learned that counsel did not want time in which to prepare an application for a continuance, but an application along entirely different lines, doubtless concluded they were not availing themselves of the request it had so kindly granted and notified the defendant and proceeded to empanel the jury. It was clearly the duty of counsel, after making the request that they wanted time in which to file an appli-

cation for a continuance, if they had changed their views as to filing such application, and desired to file an application for a change of venue, to have at once notified the court of such change of views, and their failure to do so places them in no position to complain of the action of the court in promptly overruling the application for a change of venue. The witnesses had to be secured to support the application for a change of venue, and it can only be reasonably inferred that defendant's counsel knew at the time the case was called for trial that they were going to present an application for a change of venue, and if so it was their duty to frankly so state to the court. There was no error in overruling this application.

Appellant complains of instruction 2 given by the court. The criticism of this instruction is based upon the theory that the court failed to tell the jury that if they found that the defendant committed the offense at any time within three years before the date of the filing of the information, they would find him guilty. The instruction told the jury that "if they believed from the evidence in this case that the defendant, at the county of Jasper and State of Missouri, in the year 1906, and at any time therein prior to the 26th day of February, 1906, did wilfully, unlawfully and feloniously keep a certain gambling device and table, commonly called a crap table, and that the same was then and there a gambling device adapted, devised and designed for the purpose of playing games of chance for money or property," etc., they would find the defendant guilty. This error was clearly in favor of the defendant. It limited the time in which the jury might find the commission of the acts to the year 1906, when in fact the jury were at liberty to find that he committed them at any time within three years prior to the time of the filing of the information. The testimony clearly shows that the acts constituting the offense were committed in the

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year 1906 and prior to February 26, of that year, and while this instruction is erroneous, it is not an error of which the defendant can complain.

The testimony of the State clearly supports the verdict of the jury, and finding no reversible error, the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

THE STATE v. MONROE MOORE, Appellant.

Division Two, May 14, 1907.

1. **BILL OF EXCEPTIONS: Expiration of Time: Mistake.** A bill of exceptions filed after the expiration of the time granted cannot be considered on appeal. And the fact that defendant's counsel was misled by the prosecuting attorney as to the expiration of the time, does not authorize the appellate court to consider the bill of exceptions filed after the time had expired.
2. **INFORMATION: Robbery: Time.** Time is not the essence of the offense of robbery. And an information charging this offense is not defective because it fails to specify the particular day of the month on which the alleged robbery was committed.
3. ———: ———: **Venue.** Where an information correctly lays the venue in the margin, it is not invalid because the venue is not stated in the body of the information.
4. ———: ———: **Fear of Injury: Nature of Instrument.** An information charging robbery is not invalid because it does not specify the nature of the instrument or the means by which the prosecuting witness was put in fear of immediate injury to his person.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

C. P. Hawkins for appellant.

(1) The information is bad; it does not conform to the law; it fails to inform the defendant the day of the month said alleged offense was committed; neither does it inform him with what he is charged with having put the prosecuting witness in fear of immediate injury. (2) Nowhere in the information does it charge defendant with having committed this or any other offense in the State of Missouri, but simply charges same was committed in Pemiscot county. (3) The prosecuting attorney fails to sign the information officially, but as a private individual, and does not say he is the prosecuting attorney of Pemiscot county. *State v. Lawler*, 130 Mo. 367; *State v. Bruce*, 77 Mo. 193; *State v. Kelm*, 79 Mo. 515; *State v. Anderson*, 84 Mo. 524; *State v. Russell*, 88 Mo. 648; *State v. Shortwell*, 93 Mo. 123; *State v. Green*, 111 Mo. 585; *State v. Reed*, 117 Mo. 604.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

The information, which is accompanied by the affidavit of the prosecuting attorney, is sufficient in form and substance. *Kelley's Crim. Law*, sec. 625; *R. S.* 1899, sec. 1893; *State v. Lamb*, 141 Mo. 298.

GANTT, J.—The defendant was arrested and tried upon an information filed by the prosecuting attorney of Pemiscot county charging him with having feloniously assaulted and robbed one Frank Lawson of the sum of three dollars and fifty cents on the — day of November, 1905. The defendant was tried and convicted at the same term at which the information was filed, and sentenced to five years imprisonment in the penitentiary. From that sentence, he appeals to this court.

There is no bill of exceptions in the transcript owing to the mistake and oversight of the counsel for the defendant as to the expiration of the time for the filing of the bill. Conceding that the counsel for the defendant was misled by the prosecuting attorney, we are powerless to grant him any relief on that ground. It is not asserted that the prosecuting attorney wilfully misstated the time when the leave would expire, and it was the duty of the counsel for defendant to ascertain that fact for himself, especially when it appears that he thought the time expired on the first of March, and had ample time to have obtained a written stipulation from the prosecuting attorney extending the time; this was not done. Therefore, we are restricted to the examination of the record proper for reversible error.

1. The information is assailed on the ground that it fails to inform the defendant the day of the month on which the alleged robbery was committed. The information charges that the robbery was committed on the — day of November, 1905. Time was not the essence of this offense. Any time within three years prior to the finding of the indictment was sufficient. Section 2535, Revised Statutes 1899, expressly provides that "No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected . . . for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly." [State v. Magrath, 19 Mo. 678; State v. Ward, 74 Mo. l. c. 255, 256.] Another objection to the information is that it does not charge the defendant with having committed the said robbery in the State of Missouri, but simply charges the same was committed in Pemiscot county. The information lays the venue in the margin, and section 2527, Revised Statutes 1899, provides: "It shall not be necessary to state any venue

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in the body of any indictment or information; but the county or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same." [State v. Hunt, 190 Mo. 353.] The information was well enough in this respect. The objection that the prosecuting attorney did not sign the information officially is not borne out by the record. Both in the body of the information and in his signature to the information, it appears that he was the prosecuting attorney of Pemiscot county.

Finally, it is insisted that the information is bad in that it fails to inform the defendant of the nature of the instrument or the means by which he put the prosecuting witness in fear of immediate injury to his person. As to this neither the common law nor our statute requires the grand jury or the prosecuting attorney to set out the means by which the victim of a robbery is put in fear. [Train & Heard, Prec. of Indictments, 461; 3 Chitty, Criminal Law, 806; State v. Lamb, 141 Mo. 298; State v. Montgomery, 181 Mo. 19.]

No error appearing in the information or in the arraignment, impaneling of the jury or the return of the verdict or sentence of the court, the judgment of the circuit court must be and is affirmed.

Fox, P. J., and Burgess, J., concur.

THE STATE v. JOHN DINEEN, Appellant.

Division Two, May 14, 1907.

1. **PERJURY: Indictment: Pleading City Ordinances.** It is not necessary that an indictment for perjury charged to have been committed in a trial in a police court should set forth *in hæc verba* the city ordinances creating the police court and authorizing the appointment of the clerk of the court and giving him authority to administer oaths, etc. A reference to such ordinances by their numbers and general tenor is sufficient.
2. ———: **Materiality of Testimony: When Question of Law.** When there is no dispute as to what the party charged with perjury testified to upon an issue presented in a court of competent jurisdiction, the materiality of his testimony to the issue presented is purely a question of law for the court to determine.
3. ———: ———: **This Case.** In order to constitute perjury, the evidence charged to be false must have been material to the issue presented at the trial. On the trial, in a police court, of a party charged with disorderly conduct "on Jefferson avenue," defendant's testimony that the disorderly conduct occurred, not on Jefferson avenue, but on a vacant lot some forty feet distant from said avenue, was not material to the issue presented, and, even if false, did not constitute perjury.
4. ———: ———: **Admission of Testimony.** The admission of testimony is not sufficient, in a prosecution for perjury, to prove that such testimony was material to the issue.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

REVERSED.

T. J. Rowe, Thomas J. Rowe, Jr., and Henry Rowe for appellant.

(1) An ordinance is not a matter of judicial notice; and all facts that are necessary to make a case that are not matters of judicial notice must be pleaded. An indictment must allege every substantive fact which is

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necessary to establish the guilt of the accused, and which the State is required to prove. *State v. Green*, 111 Mo. 585; *State v. Reed*, 117 Mo. 604. If the ordinances were substantive facts, which the State was required to prove, then it was necessary to plead the ordinances, because the court could not notice them judicially. (2) The materiality of the testimony, when not apparent, will not be presumed, but must be proved. *Nelson v. State*, 32 Ark. 192; *State v. Aikens*, 32 Iowa 403; *Com. v. Pollard*, 12 Met. (Mass.) 225; *Wood v. People*, 59 N. Y. 117; *Stanley v. United States*, 1 Okla. 336; *Rich v. United States*, 1 Okla. 354; *Garrett v. State*, 37 Tex. Crim. 198. (3) The mere fact that the testimony was admitted is not sufficient to show that it was material. *Com. v. Pollard*, 12 Met. (Mass.) 225; *Lawrence v. State*, 2 Tex. App. 479. Material testimony is such as tends to prove some issue in the cause. *State v. Bailey*, 34 Mo. 358; *Martin v. Miller*, 4 Mo. 47; *State v. Blize*, 111 Mo. 464. The testimony given by defendant, as alleged, was neither directly nor indirectly material to the only issue in the case, namely, was William Altherr, on Jefferson avenue, guilty of noisy, riotous or disorderly conduct? The defendant did not give any testimony which tended to prove that Altherr had said or done anything on Jefferson avenue.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) The indictment is sufficient in form and substance, and fully informed defendant of the nature of the accusation, and also showed that the alleged false testimony was material, and that the same was given before a court of competent jurisdiction. It is fully up to the requirement of the statute; and informations and indictments similar to it have been approved by this court. *State v. Cave*, 81 Mo. 450; *State v. Huckleby*, 87 Mo. 414; *State v. Walker*, 194 Mo. 369; R. S. 1899,

secs. 2033 and 2039; Kelley's Crim. Law, sec. 821. (2) The State's evidence was sufficient to justify the jury in convicting the defendant of perjury. All of the elements necessary to constitute that crime were proven, to-wit, the oath that was administered to the defendant, the materiality of defendant's evidence, the falsity of his evidence, the jurisdiction of the police court and the nature of the action that was pending in said court. If the defendant did testify that Mr. Altherr was guilty of using loud and profane language in a public place in said city, and that Altherr was also guilty of disturbing the peace at that time, certainly said evidence was material at the trial of Altherr in the police court.

FOX, P. J.—The defendant in this cause appeals from a judgment of the circuit court of the city of St. Louis convicting him of perjury. On the 2d day of December, 1905, the grand jury of the city of St. Louis returned an indictment against the defendant charging him with perjury. The perjury is charged to have been committed by the defendant in testimony given by him in a certain proceeding in the second district police court, in which court Jefferson Pollard was the judge, wherein the city of St. Louis was the plaintiff and William Altherr was the defendant. The issues upon which the defendant was called upon to testify in that case are presented in the following complaint:

“State of Missouri, City of St. Louis, ss.

“City of St. Louis, Oct. 28, A. D. 1905. William Altherr, To the City of St. Louis, Dr.

“To fifty dollars for the violation of an ordinance of said city entitled ‘An Ordinance in Revision of the General Ordinances of the City of St. Louis,’ being Ordinance No. 19991, chapter 18, article 2, section 1460, approved April 3, 1900. In this, to-wit: In the city of St. Louis and State of Missouri on the 28th day of Oc-

tober, 1905, the said William Altherr did then and there disturb the peace by noisy, riotous and disorderly conduct, to-wit, on a public street, on Jefferson avenue between University and Dodier streets. Contrary to the ordinance in such cases made and provided.”

The indictment, after alleging the creation of the police court and the authority of such court to try the complaint as above indicated and the authority of the clerk to administer oaths, charges that the proceeding against William Altherr was instituted by the plaintiff city of St. Louis against the said defendant William Altherr, for violating an ordinance of the said city of St. Louis, entitled “An Ordinance in Revision of the General Ordinances of the city of St. Louis,” being Ordinance No. 19991, chapter 18, article 2, section 1460, in this, to-wit: “In the said city of St. Louis and State of Missouri, on the 28th day of October, 1905, the said William Altherr did then and there disturb the peace by noisy and disorderly conduct on a public street, to-wit, on Jefferson avenue, between University street and Dodier street.” It was further alleged that then and there upon the trial of the said cause it became and was a material issue whether the said William Altherr on the said 28th day of October, one thousand nine hundred and five, at the said city of St. Louis, violated an ordinance of the city of St. Louis, entitled “An Ordinance in Revision of the General Ordinances of the city of St. Louis,” being No. 19991, chapter 18, article 2, section 1460, in this, to-wit, of disturbing the peace by noisy, riotous and disorderly conduct on a public street, to-wit, on Jefferson avenue, between University street and Dodier street in said city of St. Louis, and whether the said William Altherr, on said twenty-eighth day of October, one thousand nine hundred and five, at the said city of St. Louis, and on an open lot and near and adjoining a public highway, to-wit, Jefferson avenue, in a loud, boisterous and angry manner and tone of

voice, and in the hearing of various and divers persons, used certain indecent, vulgar and offensive language, calculated to cause a breach of the peace, to-wit, the language and words, "You son-of-a-bitch, take them all in," and "You son-of-a-bitch, you are not big enough." Following this allegation it is further alleged that the defendant after being duly sworn to testify the truth, the whole truth and nothing but the truth then and there was examined as a witness in said cause, and did then and there in said second district police court of the said city of St. Louis, upon the trial of said cause, and before the said Honorable William Jefferson Poliard, judge as aforesaid, unlawfully, maliciously, knowingly, wilfully, corruptly, falsely and feloniously depose and testify, among other things, that the said William Altherr on said twenty-eighth day of October, one thousand nine hundred and five, at the said city of St. Louis, was on an open lot, near and adjoining a public highway of said city of St. Louis, to-wit, Jefferson avenue, and that the said William Altherr then and there in the presence of various and divers persons spoke in a loud, angry and boisterous manner and tone of voice, and that he, the said William Altherr, then and there said, "You son-of-a-bitch; take them all in," and "You son-of-a-bitch, you are not big enough." The indictment then concludes with appropriate allegations negating the truth of the testimony as given by the defendant.

The defendant was put upon his trial upon these allegations and the testimony on the part of the State tended to prove that the defendant and one Coleman were police officers in the city of St. Louis on the 28th day of October, 1905, and that on the night of said day one William Altherr was conducting a dog and pony show under a tent on a vacant lot situate some forty feet from Jefferson avenue, and that defendant upon the trial of Altherr before the police judge testified to

noisy, riotous, and disorderly conduct on the part of said Altherr out on this vacant lot where the show was being conducted. All of the testimony tends to show that the disorderly conduct was under a part of the covering of the tent of the show and some forty feet away from Jefferson avenue on a vacant lot, and there was at the time a show being conducted under the tent. The State introduced numerous witnesses whose testimony tended to show that the testimony as given by the defendant was false.

The defendant introduced a number of witnesses who testified to his good reputation as a truthful man prior to this charge. He testified in his own behalf and substantially admitted the statements made by him on the witness stand at the trial of the Altherr case, but denied that he was sworn at said trial.

At the close of the testimony the court instructed the jury substantially upon the charge as contained in the indictment, embracing in its instructions to the jury the quantum of proof necessary to establish the offense or perjury, as well as the subjects of credibility of witnesses, the presumption of innocence of the defendant and reasonable doubt. We see no necessity of reproducing the instructions given, but will make such references to them as may be required during the course of the opinion. The cause being submitted to the jury upon the evidence and instructions, they returned a verdict finding the defendant guilty as charged in the indictment and assessed his punishment at imprisonment in the penitentiary for a term of two years. Timely motions for new trial and in arrest of judgment were duly filed and by the court overruled. Sentence and judgment was entered of record in conformity to the verdict and from this judgment the defendant prosecuted this appeal, and the record is now before us for review.

OPINION.

The record in this cause discloses two legal propositions for our consideration.

I.

The sufficiency of the indictment is challenged on the ground that the ordinances creating the police court and authorizing the appointment of the clerk and his authority to administer oaths were not properly pleaded in the indictment. In other words, we take it from the brief of counsel that it is insisted that the provisions of the ordinances should be set forth in the pleading *in haec verba*. To this contention we cannot give our assent. The ordinances are referred to by their number and their general tenor is recited. This we think was sufficient and is supported by authority. [Apitz v. Railroad, 17 Mo. App. l. c. 425; Moberly v. Hogan, 131 Mo. l. c. 25; Heman v. Payne, 27 Mo. App. l. c. 482.]

II.

The most serious proposition confronting us as disclosed by the record is the one urged by learned counsel for appellant, that the testimony as given by the defendant in the police court upon the complaint against Altherr and upon which the charge of perjury is predicated, was immaterial upon the issues presented upon the trial in which the defendant testified and therefore cannot be made the subject of perjury.

It is fundamental that in order to constitute the crime of perjury the testimony given, which is charged to be false, must be material to the issue presented at the trial. This proposition is fully recognized in *State v. Blize*, 111 Mo. 464, and in numerous cases in other jurisdictions. [Nelson v. State, 32 Ark. 192; *State v. Aikens*, 32 Iowa 403; *Com. v. Pollard*, 12 Metc. (Mass.) 225; *Wood v. People*, 59 N. Y. 117; *Stanley v. United*

States, 1 Okla. 336; Rich v. United States, 1 Okla. 354; Garrett v. State, 37 Tex. Crim. 198.]

The indictment in the case at bar proceeds upon the theory that the complaint against Altherr in the police court presented a material issue and that the testimony given by the defendant was material to the issue therein presented. In the cases of State v. Aikens, 32 Iowa 403, and Nelson v. State, 32 Ark. 1. c. 197, it was expressly ruled that the materiality of the testimony on which perjury is assigned must be established by evidence and cannot be left to presumption or inference. In other words, we take it that the law is well settled that, where there is no dispute as to what the party charged with perjury testified to upon a certain issue presented in some court of competent jurisdiction, then it is purely a question of law for the court to determine whether such testimony as given was material to the issue thus presented. We have in this case the complaint against Altherr in the police court clearly setting forth in what respect section 1460 of Ordinance No. 19991, chapter 18, article 2, was violated. This complaint clearly presented the issue to be determined upon the investigation of that complaint; therefore, the remaining crucial question is as to whether or not the testimony given by defendant upon that issue was material to it and can be made the subject of perjury under the well-settled rules of law.

At the very inception of the discussion of this proposition it is well to fix in our minds the issue upon which the defendant was called to testify. The complaint charged Altherr in the police court with a violation of section 1460 of Ordinance No. 19991, in this, to-wit: "In the said city of St. Louis and State of Missouri on the 28th day of October, 1905, the said William Altherr did then and there disturb the peace by noisy, riotous and disorderly conduct on a public street, to-wit, on Jefferson avenue, between University

street and Dodier street." That charge was predicated upon section 1460 of the ordinance heretofore indicated, which provides, so far as applicable to this charge, that "any person who shall, on Sunday or any other day of the week, disturb the peace by any noisy, riotous or disorderly conduct, in any park, street, alley, highway, thoroughfare, or other public place of public resort for pleasure or amusement or other purposes . . . shall be deemed guilty of a misdemeanor." It will be noted that this ordinance provides that the commission of such acts as above stated shall constitute a misdemeanor, and while the recovery of the fine imposed by an ordinance is a civil proceeding, it is quasi-criminal in its nature, and therefore the provisions of the ordinance imposing such fine must be strictly construed.

It will be observed that section 1460 provides that the noisy, riotous or disorderly conduct, in order to constitute the misdemeanor denounced by the ordinance, must be committed in a park or in the street, alley, highway or thoroughfare, and we take it that, under the provisions of that ordinance and as applicable to the complaint made against Altherr, the material issue presented was as to whether or not the defendant Altherr was guilty of noisy, riotous or disorderly conduct in the street known as Jefferson avenue. Having thus made apparent the issue upon which the defendant was called to testify, the remaining crucial question confronts us as to whether the testimony given by the defendant upon that issue was material to the issue there presented. If such testimony was material upon that issue and he corruptly, wilfully and knowingly swore falsely upon that issue, then he was guilty of perjury. If the testimony given was immaterial, then under the well-settled rules as applicable to this offense, he cannot be convicted of the crime of perjury, even though he swore falsely as to an immaterial matter. It is practically conceded by the State that the

testimony given by the defendant upon the investigation of the complaint against Altherr in the police court was not in reference to disorderly conduct in the street known as Jefferson avenue, but was on a vacant lot some forty feet away from the street and in a tent where Altherr was conducting a dog and pony show. Witness Patrick J. Gafney, who was captain in the Ninth district, testified in this cause and he detailed the testimony as given in the police court. He stated in his testimony that the defendant testified, to the best of his recollection, that the disorderly conduct occurred outside of the tent, but upon cross-examination the inquiry was made of him as to whether he made a memorandum of the testimony of Dineen given in that case and he answered that he did not, but that he made a memorandum of Coleman's testimony and then stated that Coleman and Dineen both testified exactly the same way. Objection was then made to this statement and it was moved that it be stricken out for the reason that it was apparent that it was merely his conclusion that Dineen had testified in the same way that Coleman had, and that the only way to determine whether they both testified exactly the same was to detail what both of them had stated there. This motion was sustained and that testimony in reference to the defendant and as to what he testified to was excluded; therefore, we must look to the other testimony in the case for the place where this disorderly conduct occurred, and as to where the defendant testified that the disorderly conduct did occur. Captain Pickel, who was captain of the Fifth police district, testified, and we take it that he located the place where the defendant testified that the disorderly conduct of Altherr took place; at least, there is no substantial testimony that is in conflict with it, and he says that to the best of his recollection the defendant testified upon the trial of Altherr before the police court that "he was inside of the tent, when he

heard a loud noise, and he looked around and he saw officer Coleman addressing Mr. Altherr; that he went over towards him when he had heard Mr. Altherr abuse officer Coleman, calling him a son-of-a-bitch and telling him to bring them all in, and stated that the officer says, 'If you repeat that to me I'll lock you up,' and he did repeat it and officer Coleman placed Mr. Altherr under arrest, and as he came to the outside of the marquee, the entrance to the marquee, Mr. Altherr broke loose from him and fell down and struck his head on a peg and cut his eye." Now the simple question is as to whether or not this testimony as given by the defendant upon the complaint against Altherr was material to the issue there presented. We have reached the conclusion that it was not material. The issue presented in the complaint against Altherr was whether or not he was guilty of disorderly conduct in the street known as Jefferson avenue. The testimony of the defendant that Altherr was guilty of disorderly conduct at a place not embraced in the complaint, in our opinion, was clearly immaterial, and it makes no difference whether the testimony was admitted or rejected; its admission is not sufficient to show that it was material. [Commonwealth v. Pollard, 12 Metc. (Mass.) 225; Lawrence v. State, 2 Tex. App. 479.]

It is insisted by the learned Attorney-General that, even though the defendant did testify that such language was used on a vacant lot and inside of a tent, and even though other witnesses testified to the same, yet the fact of the use of such language by William Altherr on said occasion was a material fact, and it is insisted that the city might have proved by other witnesses, and for aught that appears did prove by other witnesses, that William Altherr used said language on said public street. The fundamental error of this insistence consists of an effort to separate the disorderly conduct and the place where it occurred. The

disorderly conduct about which the police court had the right to inquire was only disorderly conduct in the street known as Jefferson avenue. If the contention of counsel for the State is to be maintained, then, if the defendant had testified that the disorderly conduct occurred in South St. Louis, several miles away from Jefferson avenue, on the same principle as urged it would be held as material. This certainly cannot be so held. We take it that the inquiry must be confined to the issue presented, "Did this disorderly conduct occur in the street?" And we see no way of separating the elements of the offense denounced by the ordinance, that is, that there must be disorderly conduct and it must be at a particular place, and unless the defendant testified that the disorderly conduct occurred at the place charged in the complaint against Altherr, then we take it that his testimony upon that complaint was absolutely immaterial. It will certainly not be seriously contended that if he had testified that this defendant was guilty of making a noise and disorderly conduct at some remote portion of the city and nowhere near the place charged in the complaint, such testimony would be material upon the complaint as made against Altherr in the police court.

Our conclusion upon this proposition is that the testimony given by the defendant in the trial before the police court upon the issue there presented was immaterial.

It will further be observed that the indictment in this cause as well as the instructions of the court undertakes to broaden the issue as presented in the complaint in the police court against Altherr. It will be observed that the indictment charged very properly, first, that it was a material issue as to whether the said William Altherr on the said 28th day of October, 1905, was guilty of disturbing the peace by noisy, riotous and disorderly conduct in the public street known as Jef-

person avenue, between University street and Dodier street in said city of St. Louis. Then follows the further allegation, which in our opinion was not an issue presented by that complaint, as to whether "the said William Altherr on the said 28th day of October, 1905, at the said city of St. Louis, and on an open lot and near and adjoining a public highway, to-wit, Jefferson avenue, in a loud, boisterous and angry manner and tone of voice, and in the hearing of various and divers persons, used certain indecent, vulgar and offensive language, calculated to cause a breach of the peace." The latter allegation as to a material issue was certainly not embraced in the complaint charging Altherr with a violation of the city ordinance, and instruction 1 erroneously declared the law in accordance with the allegation in the indictment, which undertook to broaden the issue presented in the complaint against Altherr.

We have thus indicated our views upon the legal propositions disclosed by the record, which results in the conclusion that upon the facts as developed at the trial of this case the defendant cannot be convicted of the crime of perjury, and the judgment of the trial court should be reversed and the defendant discharged.

All concur.

THE STATE v. BILLY BARNETT and JIM BAKER, Appellants.

Division Two, May 14, 1907.

1. **INFORMATION: First Degree Murder.** Information charging first degree murder, set out in the statement, *held* sufficient.
2. **NOTES OF TESTIMONY: Taken by Defendant on Habeas Corpus: Compelling Delivery.** It was error for the court to compel defendant's counsel to deliver to the prosecuting attorney for his inspection stenographer's notes of the testimony taken by defendant in a habeas corpus proceeding before the probate judge for the purpose of securing bail for defendant.

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3. **DEPOSITION: Regular: Improper Examination of Defendant's Counsel.** Where the deposition of a witness for defendant is regularly taken, is read without objection, and no motion is filed to suppress it for any irregularity, the prosecuting attorney should not be permitted to conduct an examination of defendant's counsel for the purpose of showing that the witness's testimony was of little value because the State was not represented at the taking of the deposition.
4. **DEFENDANT AS WITNESS: Character: Impeachment.** When a defendant offers himself as a witness, he is subject to impeachment in the same manner as any other witness, and for that purpose the State may attack his general reputation for morality.
5. **INSTRUCTIONS: Defendants Jointly Indicted and Tried: General Objection.** Where defendants are jointly indicted and tried, an objection to the instructions given as not being all the law of the case is not sufficient to convict the court of error in failing to instruct that the jury might find one or both of the defendants guilty, or acquit one or both. Defendants should have requested such an instruction, or called the court's attention to its failure to instruct upon this particular feature of the case.
6. **MURDER: Motive: No Instruction Necessary.** Where, in a prosecution for murder, the defense is justifiable homicide, an instruction as to motive is properly refused.
7. **MANSLAUGHTER: Erroneous Instruction.** An instruction is erroneous which tells the jury that if defendant killed deceased while in a violent passion suddenly aroused by a reasonable apprehension that deceased was about to kill him or inflict upon him some personal injury, he is guilty of manslaughter in the fourth degree. Apprehension of danger is applicable only to the theory of self-defense.
8. **INSTRUCTION: On Manslaughter: Conviction of Murder.** A defendant convicted of murder in the second degree has the right to complain of an erroneous instruction on manslaughter.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED.

C. G. Shepard and *Faris & Oliver* for appellants.

(1) The order of the court compelling defendants to furnish testimony against themselves was error.

Boyd v. United States, 116 U. S. 616; Cons. of Mo., sec. 23, art. 2; Cons. of U. S., amendment 5; 1 Greenleaf on Evidence, sec. 451; Cooper v. State, 4 L. R. A. 766; Rice v. Rice, 9 L. R. A. 591; 1 Wharton on Evidence, secs. 533, 536, 751; Counselman v. Hitchcock, 142 U. S. 547; Wagram on Discovery, 61; Cooley, Cons. Limitations, 370; State v. Davis, 108 Mo. 666; State ex rel. v. Hardware Co., 109 Mo. 128; State v. Young, 119 Mo. 495. (2) It was error for the court to allow the State to put C. G. Shepard, Esq., of counsel for the defendants, upon the stand and question said Shepard as to the manner of taking the deposition of E. Parks. This deposition had been offered by the defendants, without objection by the State absolutely, and no motion to suppress the same was at any time filed. The State could not upon the trial discredit the same by evidence offered in the case in rebuttal. Parks being a valuable witness for the defendants, this action of the court was damaging to the defense, and was error. Delventhal v. Jones, 53 Mo. 460; State ex rel. v. Dunn, 60 Mo. 64; Holman v. Bachus, 73 Mo. 49; Bell v. Jamison, 102 Mo. 71; Deane Pump Co. v. Green, 31 Mo. App. 269. (3) It was error to permit the State to offer testimony as to the character of the defendants prior to and without their having put their character in issue. State v. Beckner, 194 Mo. 281; 1 Wigmore on Evidence, secs. 57, 58, 59; State v. Pollard, 174 Mo. 607; State v. Nelson, 101 Mo. 464; State v. Smith, 125 Mo. 7. (4) The court erred in failing to instruct on all of the law in the case, in this respect, among others, that though defendants were jointly indicted, and though there was no sufficient testimony to go to the jury as to the guilt of Baker, yet the court did not instruct the jury that they might find one or both of the defendants guilty or acquit one or both of them as they might find the facts to be as to guilt or innocence. Under the instructions as given by the court the jury evi-

dently believed that they should find both or neither guilty. *State v. Vaughan*, 200 Mo. 1; *State v. Kaiser*, 124 Mo. 651; sec. 2627, R. S. 1899. (5) Considering the theory of the State and the instructions given by the State, defendants were entitled to have presented to the jury an instruction as to motive. This instruction the defendants offered, but the court refused. Under all the facts this was error. *State v. Foley*, 144 Mo. 600. (6) The information is repugnant and contradictory in its terms and it attempts to charge an impossible thing. 1 *Wharton's Precedents* (3 Ed), 114; *State v. Bradford*, 156 Mo. 91; *Kelley's Crim. Law*, 474.

Herbert S. Hadley, Attorney-General, and *John Kennish* and *N. T. Gentry*, Assistant Attorneys-General, for the State.

(1) The information, which was accompanied by the affidavit of the prosecuting attorney, is sufficient in form and substance. *State v. Gleason*, 172 Mo. 263. (2) Prejudicial error was not committed by the court in making the order that defendants' counsel produce for the inspection of the prosecuting attorney a copy of the testimony of a witness given upon a public trial before the probate judge of said county upon a habeas corpus proceeding brought by the defendants. *State v. Lentz*, 184 Mo. 223; *State v. Black*, 12 Mo. App. 531; *State v. Reppetto*, 66 Mo. App. 251. (3) Prejudicial error was not committed by the court in permitting the examination of C. G. Shepard, Esq., of counsel for defendants, as to the manner of taking the deposition of witness E. Parks. The only question asked the witness, Shepard, to which an objection was made and overruled and an answer given thereto, was the question as to whether or not the circuit court of that county was in session when the deposition of witness Parks was taken. All other objections were sustained by the

court. As it was a matter of no materiality or importance whether or not the circuit court was in session when the deposition was taken, defendants could not have been prejudiced by the testimony of this witness. No citation of authorities is necessary on the proposition that this court will not reverse and remand a cause for the commission of non-prejudicial error. (4) The court did not err in permitting the State to prove the reputation of the defendants for morality. Each of the defendants testified in the cause. A defendant who testifies in his own behalf may be impeached in the same manner as any other witness, and it is settled law that the reputation of a witness for morality may be proven for the purpose of impeachment. This question has been fully considered by this court in the recent case of *State v. Beckner*, 194 Mo. 281, and decided against the contention of appellants. (5) It is assigned as error that the court failed to instruct the jury on all questions of law arising in the case, in this: That, though the defendants were jointly indicted and tried, the court did not instruct the jury that they might find one or both of the defendants guilty, or acquit one or both, as they might find the facts to be as to guilt or innocence. It is conceded that such an instruction was not given in this case, neither was such an instruction requested by the defendants. The case of *State v. Vaughan*, 200 Mo. 1, in which this question was fully considered by this court, is cited and relied upon by the defendants as authority that error was committed by the trial court. It will be observed that in the *Vaughan* case an instruction upon this question of law was asked by the defendants and refused by the court, and it was the action of the court in refusing to give such instruction that was held to have been error by this court. The defendants did not ask an instruction upon this question of law, and having failed to do so, they cannot now, for that reason, convict the trial court of error.

State v. Weatherman, 202 Mo. 6; State v. Bond, 191 Mo. 555; State v. McCarver, 194 Mo. 717; State v. West, 202 Mo. 128. (6) The court did not err in refusing instruction C, asked by defendants. State v. Lynn, 169 Mo. 664.

FOX, P. J.—This cause has reached this court by appeal on the part of the defendants from a judgment of the circuit court of Pemiscot county convicting them of murder in the second degree. Since reaching this court the death of the defendant Baker has been suggested; therefore, we will confine our attention to the complaints of the defendant Barnett.

On the 16th day of January, 1905, an information was filed, duly verified, by L. L. Collins, prosecuting attorney of Pemiscot county, charging the defendant with murder in the first degree. As the sufficiency of this information is challenged it is well to here reproduce it. Omitting formal parts, it is as follows:

“L. L. Collins, prosecuting attorney within and for the county of Pemiscot and State of Missouri, upon his official oath and upon his hereto appended oath informs the court that Billy Barnett and Jim Baker, late of the county of Pemiscot and State of Missouri, on the 13th day of January, 1905, at the county of Pemiscot and State of Missouri, did then and there in and upon the body of one Joe Morgan, then and there being, feloniously, willfully, deliberately, premeditatedly, on purpose and of their malice aforethought, did make an assault, and that the said Billy Barnett and Jim Baker with a certain pistol, then and there charged and loaded with gunpowder and leaden balls, which said pistol they, the said Billy Barnett and Jim Baker, in their hands then and there had and held, then and there feloniously, willfully, deliberately, premeditatedly, on purpose and of their malice aforethought, did discharge and shoot off, to, against and upon the said Joe Morgan.

And that the said Billy Barnett and Jim Baker, with the leaden balls aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid by the said Billy Barnett and Jim Baker discharged and shot off as aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, on purpose and of their malice aforethought, did strike, penetrate and wound him the said Joe Morgan, then and thereby feloniously, willfully, deliberately, premeditatedly, on purpose and of their malice aforethought, giving to him the said Joe Morgan in and upon the right side of the body of him, the said Joe Morgan, one mortal wound of the depth of ten inches and of the breadth of one-half of an inch, of which mortal wound he, the said Joe Morgan, then and there instantly died. And so L. L. Collins, prosecuting attorney as aforesaid, upon his official oath as aforesaid, doth say that the said Billy Barnett and Jim Baker, him, the said Joe Morgan, in the manner and by the means aforesaid, at the county and State aforesaid, feloniously, willfully, premeditatedly, deliberately, on purpose and of their malice aforethought, did kill and murder, against the peace and dignity of the State."

The prosecuting attorney, after the return of this indictment, elected to prosecute the defendants for murder in the second degree. The testimony introduced upon the trial is conflicting and it will be sufficient to indicate the facts that the testimony offered by the opposing sides tended to prove.

The testimony on the part of the State tended to establish that the difficulty which resulted in the death of the deceased, Joe Morgan, occurred at Cottonwood Point, a small town in Pemiscot county, situated on the Mississippi river several miles below Caruthersville, and that at the time of the killing of the deceased he was marshal of the town of Cottonwood Point as well as constable of that township. The defendant Barnett

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was the proprietor of a saloon which was located outside of the town limits of Cottonwood Point. The defendant Baker resided a few miles in the country but was in the habit of doing most of his trading at Cottonwood Point. At about half past seven o'clock on January 13, 1905, the deceased was in Watson's store in company with members of the town board. Steve S. Pate, who was a member of the board, testified that he heard defendant Baker making some noise out on the street that night before the shooting. He says first in his testimony that he was "hollering" and cutting up; he afterwards said "he was just hollering, is all I know," and the witness did not remember whether he was swearing or not; he finally said, "He hallooed two or three times, or something that way, tolerably loud." He further says that Baker was intoxicated. This witness further states that Morgan left Watson's store and went out on the street; went out of the front door. "There is a porch in front of that building. After Joe Morgan got out of the house and went into the street it wasn't but a few minutes until they began shooting. To the best of my knowledge about ten shots were fired. When the first shot was fired I was in Watson's store at the place of the council meeting; as soon as the first shot was fired I ran out of store into the street." He further states that the firing was up close to the Gay saloon in the street, which is the same street that Morgan went into when he left the store. "I suppose it is about 135 or 140 feet from the Watson store building to the point where this shooting occurred. I ran out into the street when the first shot was fired." This witness further says that he did not see anyone but Barnett and Baker and that Morgan was back over on the west side of the street, back next to the old Gay building. This witness was some distance from the place where the shooting occurred and the tendency of his testimony is that the

defendants and Morgan were not close together when the shooting was going on; at least, he says, "if Joe Morgan was anywhere about the defendant while the shooting was going on, I didn't see him." He says further, "I did not see him when I first ran out into the street," and that if he was in the street he did not see him, and gives it as his impression that if he had been anywhere close to the defendant he could and would have seen him. This witness further testified that he was about 100 feet or something that way from the defendants and says it was a light night, tolerably cold and the ground was frozen, probably an inch or two inches thick. He further states that, after the deceased fired three or four shots, he, the witness, walked up there a little piece towards them, and he says, "I saw Morgan kind of weaken and I rushed up to him and he said, 'They have killed me;' I caught hold of him and went to Watson's store with him. He was badly hurt and suffering a great deal. He lived ten or twelve minutes after that. I don't remember his saying anything about the defendant after that." Dr. Tipton was summoned, but did not reach Watson's store until after the death of the deceased. He testified that the bullet entered the deceased's body on the right side of the eleventh rib near the median line; that it passed through the body at an angle of about thirty degrees and lodged near the seventh rib, one inch to the left and about three inches below the nipple on the left side. He further testified that in his opinion the deceased died from the effect of said gun-shot wound.

The State's evidence further tended to show that the defendant Baker stated on the next day after the shooting that he was drinking and that they made some noise after going out of the barber shop and someone tried to arrest him and defendant Baker said, "God damn you, you can't arrest me;" that the deceased commenced shooting and that Barnett shot the deceased

over the shoulder of the defendant Baker. There was further evidence introduced by the State tending to show that the defendants concealed themselves for something like two weeks after the difficulty. After arrangements had been made or attempted to be made for their release upon bond, they, with their attorney, came to see Sheriff Franklin at his office in Caruthersville and surrendered themselves.

The testimony on the part of the defendants tended substantially to show about the following state of facts: That Barnett, one of the defendants, lived about a half mile and the other some two miles from and north of Cottonwood Point; that they came into town about sundown on the 13th day of January, 1905. Upon reaching Cottonwood Point defendants went into the store of Ed Watson and ate a lunch; after they had eaten this lunch they went to a barber shop and one of the defendants, Billy Barnett, was shaved and had his hair cut. Immediately after this work was finished the defendants started back north, leaving the town to return home. Shortly after they left the barber shop defendant Baker hallooed, and used this expression, "Give me some fire crackers." After proceeding some hundred feet, he again hallooed, using, as he said, the same expression. At this time the village board of trustees was in session, and deceased, who was town marshal and constable of the township, was present at this board meeting. That immediately after defendant Baker had hallooed, deceased left the room in which the board meeting was being held and went out on the street. Witness Parks for the defendant testifies that as the deceased went out of the door he reached back as if to draw a pistol. Shortly after the deceased went out of the Watson store building where the town board was holding a session, the testimony for the defendant tends to show there were seven or eight shots fired. The defendants both testified that they were going

along a path some four feet wide and had reached a point about two hundred and eleven feet from the barber shop when the deceased came upon the right side of the defendant Baker and placed his hand on defendant Baker's shoulder, at the same time saying, "Consider yourself under arrest." That defendant Baker said, "Is that you Joe Morgan?" and deceased replied, "Yes." Thereupon, defendant Baker said, "You can't arrest me." That thereupon deceased instantly raised his right hand, which contained a pistol, and fired across the shoulder of defendant Baker at defendant Barnett. Defendant Baker threw his right hand up, and striking the pistol of deceased, deflected this shot. Defendant Barnett then drew his pistol and as deceased fired again struck deceased's pistol and deflected his (deceased's) second shot. Defendant Barnett then fired one shot at deceased, which deceased deflected by striking Barnett's pistol, and deceased fired a third shot at defendant Barnett. Thereupon, the pistol of deceased snapped twice, failing to explode, defendant Barnett in the meantime fired three shots at deceased in rapid succession. Deceased, who during all the time of this shooting had hold of the right arm of defendant Baker, while Barnett held to Baker's left arm, then released Baker's arm and fell back or staggered back and when some six or eight feet away again fired his fourth and last shot. Upon an examination of the ground immediately after the shooting, it was found that the ground was kicked up and disturbed at a point about seven or eight feet from the corner of a building used as a residence by witness Julius Taylor. Taylor was only some seventeen or twenty feet from the scene of the difficulty, but was inside of his house so that he could not see by whom it was done. Taylor testified that all eight of the shots were fired from apparently the same point; that after the shooting he immediately investigated and found the ground

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kicked up, as if by men scuffling, and that at or near this point he found the cap which deceased had on when he left the board meeting. It further appears in evidence that deceased was armed with a six-shot 41-calibre Colt's pistol, from which it was found he had fired four shots during the difficulty. Two loaded cartridges, both of which had been snapped or struck with the hammer of the pistol, but not exploded, were found in the pistol of deceased. Defendant Barnett was armed with a thirty-eight calibre pistol of the Smith & Wesson make. The testimony on the part of the defendant tended to show that the pistol of the deceased was much larger than that of defendant Barnett, and when fired made a much louder report, and that the first two shots were louder than the succeeding ones till the last two. It further appears from the testimony that Baker was not armed at all; did not even have a pocket knife. There was no testimony introduced by the State showing any prior ill-feeling on the part of the defendants against the deceased. There was other testimony introduced by the defendant showing that the deceased had made prior threats against the defendant Barnett and his brother to the effect that if the deceased ever had to arrest them he would give them no show but kill them. There was some testimony offered by the defendants tending to show that the deceased was of a rash, turbulent and violent disposition.

In rebuttal, the State offered testimony tending to prove that no threats were made by the deceased at the time testified to by defendant's witnesses. There was also testimony offered by the State showing the bad reputation of the defendants who had testified as witnesses, and that some of the witnesses for the defendants were of bad reputation for truth and veracity.

At the close of the testimony the court instructed the jury upon murder in the second degree and manslaughter in the fourth degree and upon self-defense,

reasonable doubt, and gave other instructions upon questions to which the testimony was applicable. The errors complained of respecting the instructions will be given proper attention during the course of the opinion. This is a sufficient statement of the testimony developed at the trial to enable us to determine the legal propositions arising from the disclosures of the record. The cause was submitted to the jury upon the evidence and instructions of the court, and they returned a verdict finding both of the defendants guilty of murder in the second degree and assessing their punishment at imprisonment in the penitentiary for a term of ten years. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Sentence and judgment were pronounced and entered of record in accordance with the verdict and from this judgment the defendants in due time and proper form prosecuted their appeal to this court, and the record is now before us for consideration.

OPINION.

The record in this cause discloses the assignment of numerous errors as a basis for the reversal of this judgment.

I.

It is insisted by learned counsel for appellant that the information in this cause is not sufficient to support the judgment and that the demurrer to the information should have been sustained. It is sufficient to say upon this insistence that we have carefully analyzed all of the allegations of the information and find that they are substantially in harmony with approved precedents by this court.

II.

It is insisted that the court committed error in compelling defendants to deliver to the prosecuting at-

torney certain notes of testimony taken upon a proceeding before the probate judge upon a writ of habeas corpus for the purpose of securing bail.

It is disclosed by the record that there was an application for bail before the probate judge and upon that application the testimony of witnesses was taken. It also appears that counsel for the defendant, for the purpose of preparing for the trial of the case and the proper management of the case, had their stenographer present who took the testimony of these witnesses and transcribed it for counsel for the defendant. During the progress of this trial at which the defendants were convicted, upon the application of the prosecuting attorney, the court made the following order:

“The court makes an order on the defendants’ counsel, Messrs. Faris & Oliver and Shepard, upon the representation to the court that defendants’ counsel have in their possession testimony of witnesses taken upon application of the defendants in this case for bail before the judge of the probate court of this county and with the prosecuting attorney representing that he desires to examine this testimony, not having any himself, the court makes an order on the gentlemen to produce it for his inspection.”

To the making of this order counsel for defendants objected and earnestly protested against the delivery of the notes of their testimony to the representative of the State. The court overruled their objections and compelled them to deliver their notes to the prosecuting attorney for his inspection.

We are unable to see upon what theory the action of the court in making this order can be maintained. While it is true this was a public trial, yet this testimony was taken by the stenographer simply for the use of the defendants’ counsel and there was no power in the court or any other person to compel the production of the private notes of testimony taken by the private

stenographer for their own use to be used by the prosecuting attorney in aiding him in the management and conduct of the prosecution of the defendants in this cause. It would certainly not be contended that if the defendants' counsel had taken notes of this testimony with a lead pencil or pen and ink themselves, the court would be authorized to compel them to furnish such notes to the prosecuting attorney, yet there is absolutely no distinction to be drawn between the taking of notes by the counsel and having it done by a stenographer. There was no law requiring this testimony to be taken by a stenographer and transcribed, and therefore it can only be treated as simply a precaution on the part of the defendants' counsel to properly prepare and manage their case, that they sought to preserve the testimony of the witnesses taken upon this application for a writ of habeas corpus, and these notes of the testimony as taken by the stenographer were as much their private property and absolutely under their control as notes taken of the testimony by calling witnesses into their office and inquiring of them what they knew about the case and preserving their statements by having a stenographer take the questions and answers that might be made by such witnesses in the office of counsel. That this was error, in our opinion, is too plain for discussion, and the order of the court should have never been made. However, we deem it unnecessary to express an opinion as to whether such error would constitute reversible error, and while it may not fall directly within the inhibition of the Constitution which prohibits the compelling of a defendant to testify against himself, it is clearly very close to the verge of violating that constitutional provision by compelling the counsel for defendants to furnish their private notes taken by their stenographer in order to aid the prosecution in conducting the prosecution against their clients. We are unwilling to sanction that method

of conducting prosecutions by the prosecuting officers of this State.

III.

The record discloses that the defendants took the deposition of witness E. Parks. This deposition was read in evidence by the defendants' counsel without objection by the State and there had been no previous motion to suppress the same on account of any irregularity in the taking of the deposition. In other words, the record discloses that it was practically conceded that the deposition was taken upon due notice and filed in the circuit court of Pemiscot county and read in evidence for the defendants. It is disclosed by the record that after the reading of the deposition of E. Parks in evidence the prosecuting attorney called C. G. Shepard, one of the counsel for the defendant, and over the objections of the defendant proceeded to an examination of him in respect to the taking of the deposition. We will not burden this opinion with a reproduction of the examination of Mr. Shepard, but it is sufficient to say that we have read such examination carefully and duly considered it, and we are of the opinion that this examination was entirely unauthorized and it is apparent that the only purpose was by an illegitimate and illegal method to destroy whatever force and effect might be given by the jury to the testimony of the witness whose deposition was taken. The prosecuting attorney had due notice of the taking of this deposition and the court should not have permitted him to even indulge in an examination of counsel for defendant in respect to the taking of that deposition that had no other purpose in view except to impress the jury that the witness's testimony was of little value for the reason that the State was not represented at the taking of the deposition.

While it is the province and the duty of counsel

representing the State to avail himself of all legal methods to contradict and impeach witnesses introduced by the defendant, yet it was clearly not his duty, the deposition having been regularly taken, read without objections, and no motion having been filed to suppress for any irregularity, to undertake to weaken and destroy the force of the testimony of the witness whose deposition was taken, in a manner that is entirely unauthorized in the legitimate and proper administration of justice. The examination of Mr. Shepard was simply for the purpose of showing that the circuit court of Pemiscot county was in session, therefore impressing the jury that the prosecuting attorney was unable to be present at the taking of it, finally emphasizing what the deposition should have shown by asking the question as to whether or not any one was there representing the State; then follows the question as to whether or not counsel for the defendant had not agreed to let him know on what date the deposition would be taken so that he could have some one present to represent the State; and the deposition shows that the prosecuting attorney had notice as to what date the deposition would be taken. Then follows in such examination of Mr. Shepard questions propounded to him respecting the testimony of the witness, Mr. Parks, before the probate judge in the proceeding for habeas corpus. It is apparent from the record that these questions were propounded from the testimony preserved by defendants' counsel which the court compelled them to deliver to the prosecuting attorney, and while the court excluded these questions, the representative of the State insisted not only on propounding the questions, but in violation of the ruling of the court read the questions and answers of this witness. While the learned and esteemed trial judge very promptly sustained objections to such questions and answers, yet the record discloses that counsel for the State did not

heed such ruling and insisted upon getting before the jury improper testimony which was taken in the proceeding for habeas corpus.

This examination cannot be too strongly condemned, and the court should have promptly stopped any examination along that line, and if counsel for the State insisted upon violating the injunction of the court, then such methods as are plainly within the power of the court should have been exercised to have compelled obedience to its rulings.

IV.

Appellants complain of error on the part of the trial court in admitting testimony of the moral character of the defendants in the neighborhood in which they reside. The defendants had offered themselves as witnesses in this case and under the rules of law as uniformly announced by this court they were subject to impeachment in the same manner as any other witness, and for that purpose the State had the right to attack their general reputation for morality. This proposition was thoroughly reviewed and settled by this court in the recent case of *State v. Beckner*, 194 Mo. 281.

V.

It is assigned as error that the court failed to instruct the jury on all questions of law arising in the case. Upon this proposition our attention is specially directed to the failure of the court to instruct the jury "that though the defendants were jointly indicted and tried the court did not instruct the jury that they might find one or both of the defendants guilty, or acquit one or both, as they might find the facts to be from the evidence."

The record upon this question discloses the following: After the instructions were read to the jury

counsel for the defendants stated to the court that "defendants desire to except to the instructions as given by the court as not being all the law in the case.

"Court: Come now the defendants and object to the instructions as offered by the court, because they do not contain all the law in the case. Then the court requests the gentlemen to present any additional law they may desire or suggest to the court any additional law.

"Mr. Faris: We have already suggested, and desire to say on the part of defendants, that we have already suggested certain instructions which the court has refused, and except to the refusal of the instructions."

The record fails to disclose that the defendants' counsel offered an instruction or suggested that the court instruct the jury along the lines of finding one or both of the defendants guilty or not guilty. In support of this contention our attention is directed to the recent case of *State v. Vaughan*, 200 Mo. 1. In that case, however, the record discloses that the defendants' counsel offered an instruction upon the subject now under consideration and the instruction was refused by the court, and it was for the refusal of that instruction that the *Vaughan* case was reversed and remanded. We see no reason to depart from the rule as announced in the case of *State v. Weatherman*, 202 Mo. 6, in which it was expressly ruled by this court that "Keets Weatherman, one of the parties informed against as an accomplice of the defendant, testified in behalf of the State, but the court failed to give the usual cautionary instruction as to such testimony, although the defendant asked the court at the time the instructions were read to the jury to instruct upon all the law of the case. But no intimation was given the court by this motion as to what particular points of law had been neglected or overlooked by the court in its instructions, or upon which defend-

ant desired instructions. Defendant now insists that the court should have given the usual cautionary instruction upon the testimony of the accomplice. But, in fairness to the court, the defendant, if he desired such an instruction, should have asked for it, or have called the attention of the court to its failure to instruct upon this feature of the case. [State v. Bond, 191 Mo. 555; State v. McCarver, 194 Mo. 717; State v. West, 202 Mo. 128.]”

VI.

Complaint is made by appellants' counsel of error in the giving of instructions 1 and 5. The errors complained of in these instructions relate entirely to the defendant Baker, and the death of the defendant Baker having been suggested, we deem it unnecessary to discuss the errors complained of in those instructions.

VII.

Complaint is made that the court erred in refusing instruction “C” requested by the defendants. This instruction directed the jury that if the evidence failed to show any motive on the part of the defendants to commit the crime charged, this was a circumstance to be considered by the jury in connection with the other facts and circumstances in the case in making up their verdict.

We are of the opinion that there was no error in the refusal of this instruction. The defense in this case was upon the theory that the defendants were justified in killing the deceased under the facts developed at the trial, and the testimony of the defendants fully furnishes the motive for such shooting, and the record further discloses upon the theory advanced by the defendants that the motive in shooting the deceased was to prevent him from accomplishing a design to do them some great personal injury, and what was said in the

case of State v. Lynn, 169 Mo. l. c. 673, by BURGESS, J., in responding to a contention made in that case, is applicable to the disclosures of the record in the case at bar. It was there said: "The point is made that the court erred in refusing an instruction asked by the defendant, numbered one, which told the jury that in case they failed to find any motive on the part of the defendant for the commission of the crime charged against him, then this ought to be considered with the other evidence in making up their verdict. There was no error in refusing this instruction. There was nothing upon which to predicate it. Defendant admitted the killing and testified that he shot deceased in self-defense, and to save his own life. This, according to defendant's own testimony, furnished the motive for the homicide."

VIII.

The record discloses the preservation of exceptions to the giving of all the instructions on the part of the State; therefore, we have carefully considered the instructions as given. The statement of the evidence as disclosed by the record authorized an instruction upon manslaughter in the fourth degree. This was recognized by the trial court by the giving of an instruction embracing that grade of the crime; however, in our opinion the instruction as given on manslaughter in the fourth degree was erroneous. The instruction was as follows:

"The court instructs the jury, if you believe from all the evidence that at the time the defendant Billy Barnett shot and killed the said Joe Morgan, if you believe from the evidence that defendant Barnett did kill him, by shooting him with a loaded pistol, the defendant was acting under a violent passion suddenly aroused by reason of a reasonable apprehension on the part of the defendant Barnett that Morgan was in the act of draw-

ing some weapon upon him for the purpose of killing him or inflicting upon him some personal injury, you cannot find the defendant guilty of murder, for in that case the law presumes that such shooting was done without malice but by reason of such passion; on the other hand, although you may believe that defendant Barnett shot and killed Morgan, while in a violent passion, suddenly aroused as above stated, yet if you shall further believe from all the evidence that such killing of Morgan was done by defendant Barnett and that the same was not necessary to the self-defense of said Barnett, as explained in other instructions, you will find the defendant Barnett guilty of manslaughter in the fourth degree, and assess his punishment at imprisonment in the penitentiary for a period of two years or at imprisonment in the county jail for a period of not less than six months nor greater than one year, or by fine of not less than five hundred dollars, or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months."

The error of that instruction consists in telling the jury that if the defendant shot and killed the deceased while under a violent passion suddenly aroused by reason of a reasonable apprehension on the part of the defendant Barnett that Morgan was in the act of drawing some weapon upon him for the purpose of killing him or inflicting upon him some personal injury, etc., then the jury would find him guilty of manslaughter in the fourth degree. The apprehension of danger could only have reference and be applicable to the theory of self-defense. The mere apprehension of danger cannot be made the basis of an instruction authorizing the lessening of the grade of the crime, and therefore it may be that the jury, if they had been properly directed that if this shooting was done under a violent passion by reason of the assault and struggle going on about

the time of the shooting, and such instruction had been predicated upon the testimony of witness Taylor who investigated the ground and said it had been kicked up as if by men scuffling, would have found that the defendant did the shooting while under a violent passion aroused by such state of facts, but were unwilling to believe that his passion was aroused by reason of the apprehension of danger. This instruction was erroneous, and we are unwilling to guess or surmise as to what the finding of the jury would have been if the instruction for manslaughter had been predicated upon the state of facts as disclosed by the record.

The law is well settled in this State that the court should properly instruct the jury upon all grades of the crime to which the testimony may be applicable, and while it may be true that if the defendant was convicted of a lower grade of the offense he would have no right to complain of an erroneous instruction upon some higher grade, for the reason that he was not convicted of that grade of the offense, yet it needs no citation of authorities to show that, if the defendant is convicted of the higher grade of crime, he has the right to complain of an instruction given by the court upon a lower grade of offense of which he may have been convicted, and might justly contend that if the law had been properly declared upon the lower grade of crime, the jury may have convicted him of that lower grade.

We have indicated our views upon the main propositions disclosed by the record, and while we will not undertake to say that there was not sufficient testimony to support the verdict of the jury, yet it is clear that the testimony in this case was conflicting, and while the defendants may have unnecessarily taken the life of a human being, yet if we are to longer regard the forms of law and respect the rule that the defendant is entitled to a fair and impartial trial, with the errors as heretofore pointed out, we are unable to conclude that the

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verdict of the jury should be permitted to stand. We feel that the ends of justice would be best subserved by awarding the defendant a new trial in which the errors indicated may be avoided.

The judgment of the trial court should be reversed and the cause remanded, and it is so ordered.

All concur.

THE STATE v. HARRY VAUGHAN, GEORGE
RYAN and EDWARD RAYMOND, Appellants.

Division Two, May 14, 1907.

1. **CONSPIRACY: Indictment: Evidence.** It is not necessary, in order to the admission of evidence of a conspiracy between defendant and others, that such others be included in the indictment.
2. **MURDER, FIRST DEGREE: Escaping from Prison: Killing Guards.** Defendants who killed a penitentiary guard while they were attempting to escape from the penitentiary where they were lawfully confined, were guilty of murder in the first degree, and the court properly refused to submit to the jury instructions as to murder in the second degree. [Following *State v. Vaughan*, 200 Mo. 1.]

Appeal from Cole Circuit Court.—*Hon. Wm. H. Martin*, Judge.

AFFIRMED.

E. L. King and *Edwin Silver* for appellants.

(1) The indictment charged only the defendants with having jointly committed the homicide, and it was improper, as was done in instruction 2, to instruct on the theory of a conspiracy between the defendants and one Hiram Blake, who was not named in the indictment. *Taylor v. Commonwealth*, 90 S. W. 581. (2) (a) The

court erred in refusing to give at the request of defendants' instructions 7, 8, 9 and 10. We submit said instructions have the support of the following authorities: *State v. May*, 142 Mo. 135; *People v. Knapp*, 26 Mich. 112; *Frank v. State*, 27 Ala. 37. Where two persons conspire to fight with their fists, and one resorts to the use of a deadly weapon without the other's knowledge or consent, the other cannot be held responsible for the act of the former in so doing. *State v. May*, 142 Mo. 135; *People v. Knapp*, 26 Mich. 112; *Mercensmith v. State*, 8 Tex. App. 211; *Frank v. State*, 27 Ala. 37. (b) It is not proper or sound to hold a participant in an attempt to escape guilty of murder in the first degree where one of his associates departs from their joint plan and purpose and commits a homicide—he lacking the specific intent to kill, and the homicide not being committed in the perpetration, or attempted perpetration, of one of the offenses enumerated in section 1815, Revised Statutes 1899—he would be guilty, at most, of only murder in the second degree.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) The indictment is sufficient in form and substance. In one count it charged defendant Vaughan with shooting and killing one John A. Clay, and the other defendants with being present, aiding and abetting; and, in the second count it charged that all three of the defendants shot and killed said Clay. *Kelley's Crim. Law*, sec. 474; *State v. Wilson*, 172 Mo. 423. (2) The instructions given at the request of the State were correct; they properly defined the crime of murder in the first degree, which is the only crime of which the defendants could have been convicted. Murder committed in the perpetration of another felony, or in the attempt to commit another felony, is murder in the first

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degree. Even if the defendants armed themselves solely for the purpose of making their escape from prison (which no person can believe), still they were guilty of murder, which was committed as an attendant result of such effort to escape. *Mayes v. People*, 106 Ill. 306; *State v. Bailey*, 190 Mo. 288; *Evans v. State*, 109 Ala. 22; 2 Bishop's New Crim. Law, sec. 641; 2 Wharton's Crim. Law, sec. 1405; *Martin v. State*, 89 Ala. 118; *Peden v. State*, 61 Miss. 270; 1 Bish. Crim. Law, sec. 636; *Boyd v. U. S.*, 142 U. S. 455; *Ferguson v. State*, 32 Ga. 658; *State v. Walker*, 98 Mo. 105; *Kirby v. State*, 23 Tex. App. 25; *State v. Vaughan*, 200 Mo. 1. (3) Neither was error committed in refusing to give instruction 7, asked by the defendants, on murder in the second degree. There was no murder in the second degree, or manslaughter, in this case; hence, said instruction was properly refused. *State v. Vaughan*, *supra*; *State v. Cushenberry*, 157 Mo. 182. (4) The act of breaking out, or of attempting to break out of the penitentiary, was an unlawful act and a felony in itself. R. S. 1899, secs. 2067 and 2072; *State v. Johnson*, 93 Mo. 317. All of the defendants and Blake having conspired to commit that felony, and working together for that purpose, the commission of murder by one of the four in the presence of the others, and while all of them were still engaged in the common undertaking, fixes the guilt for that crime upon them all.

GANTT, J.—This is the second appeal in this cause. The first is found reported in 200 Mo. 1.

The defendants were indicted at the November term, 1905, for the murder of John A. Clay on the 24th of November, 1905. When the cause was here at the October term, 1906, of this court, it was reversed for the sole reason that the circuit court refused to instruct the jury that they were at liberty to find one or more of the defendants guilty and the others not guilty as

they might deem right and proper under the instructions of the court and the evidence in the case. On the re-trial of the cause on January 12, 1907, the circuit court gave said instruction in addition to those which it gave on the former appeal, and the jury under the evidence and the instructions of the court found each of the defendants guilty of murder in the first degree as charged in the indictment. And after motions for new trial and in arrest were heard and overruled, sentenced each of the defendants separately to be hung on the first day of March, 1907. From that sentence the defendants have in due and proper form appealed to this court.

As on the former trial, the testimony on behalf of the State tended to prove that all three of the defendants and one Hiram Blake were on the 24th of November, 1905, lawfully imprisoned in the State penitentiary situated in the eastern portion of Jefferson City, Missouri. That around the penitentiary buildings and grounds, there is a high stone wall, and the entrances into the penitentiary are through the western walls. A short distance north of the north wall are situated the tracks of the Missouri Pacific Railroad and a few feet north of the tracks is the Missouri river. In the testimony of the witnesses two entrances are referred to, one being through the office in the administration building of the penitentiary, entering the grounds through an ordinary door opening into an iron cage, the other one, the wagon entrance; this last-named entrance was used by all vehicles that had occasion to go in and out of the prison walls, and consisted of two sets of double doors situated some distance from each other. On the 24th of November, 1905, Matt. W. Hall was warden, R. E. See was deputy warden and John A. Clay, Ephraim Allison, J. K. Young and John Bruner were guards at the prison. It was the duty of Mr. Clay to stand in the wagon entrance between the two double

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doors, inspect the contents of the various loads that passed through said entrance, and attend to the locking and unlocking of the doors. Mr. See's duties as deputy warden required that he spend most of his time in his office, which was some seventy-five feet north of the iron cage entrance, and this entrance was some fifteen or twenty feet north of the wagon entrance. Mr. See's office was on the ground floor and opened out into the yard of the prison, and this yard opened into the stockade in which were located the prison shops where the three defendants and one Blake were working. Warden Hall and several of the prison officials were absent from the city on official business, having left Jefferson City on the forenoon of that day. About three o'clock on the afternoon of said day two gentlemen from Osage county were admitted as visitors to the prison and were sitting in the deputy warden's office talking to a prisoner, when the three defendants and Blake appeared at the door of the said office with pistols in their hands and commanded deputy warden See to hold up his hands, threatening to kill him if he refused. Mr. See endeavored to draw his pistol and one of the four convicts fired his pistol, striking See in the wrist and also wounding defendant Vaughan in the hand. Vaughan was in the act of grabbing Mr. See's hand when Blake shot at Mr. See. See was then disarmed by them, dragged out of his office and ordered to march between Blake and the defendant Vaughan to the wagon entrance; and the two visitors were also ordered to march, one by the side of the defendant Ryan and the other by the side of the defendant Raymond. The wagon entrance was reached just as the inner doors were being opened to admit a two-horse wagon into the prison yard, and the four convicts rushed through said doors, taking with them Mr. See and one of the visitors, the other visitor managed to get loose and escaped. The four convicts ordered Mr. Clay, who was on duty

at that point, to hold up his hands, which he did; they then ordered him to hold his hands up higher. Someone in the wagon entrance then fired at Clay, striking him in the neck and killing him instantly. As the space in this wagon entrance was tolerably dark, neither Mr. See nor Weggeman, one of the visitors, could state who it was who fired the shot, but the driver of the team, Charles Woodland, testified positively that the defendant Vaughan was the first man to push into said wagon entrance and that Vaughan fired the shot. Other shots were fired by the defendants and Blake in said entrance, some of which were so close as to burn Mr. See's face with powder. These defendants then ordered See to unlock the outside doors, but he told them that he could not and did not know how, and finally suggested to them that he could show them a better way through the office. The defendants and Blake then went with Mr. See to a door that opens into this wagon entrance from the guard room, where Mr. Allison appeared at the door and ordered the men to throw up their hands, whereupon one of the four shot and killed Mr. Allison. One of the four then shouted, "Kill them all, let's shoot our way out." About that time one of them shot Mr. See in the shoulder and in the side, and he fell to the ground. One of them then said, "Captain See is dead, now get to work, we are losing time." Mr. Young was up stairs in the armory and hurriedly came down to discover the cause of the disturbance. He saw the body of Mr. Allison on the floor, and walked toward the door opening into the wagon entrance, when some one in this entrance shot him. Hearing the firing, Mr. Bruner, another guard, ran from the dining-room building to the inner doors of the entrance and looked in through a small hole in the door; some one in the wagon entrance commanded him to go away, and shot at him. Thereupon, these four convicts, having made one ineffectual effort to blow open the outer door with nitro-

glycerin, again applied it to the outer doors of the wagon entrance, and this time succeeded, and by its explosion a large strip was blown off of one of the said doors, making a hole sufficient in size for them to jump through and make their escape, which they did. After getting out of the prison, the three defendants and Blake ran together towards the Missouri Pacific railway tracks and west along said tracks toward the station. They stopped a moment to re-load their pistols and ran around on the north side of some freight cars. Captain See and the guard, Bruner, followed them towards the depot. Bruner soon came within range of them and exchanged several shots with them. He succeeded in wounding Blake in the leg. Blake was then captured and taken back to prison, where he soon died from the effects of his wound. In the meantime, the police of Jefferson City had been notified of the escape and joined in the pursuit of the three defendants herein, and after a running fire they were all three captured and returned to the prison. At the time of the capture each defendant had a 44-calibre pistol in his hand, and from forty to one hundred cartridges in his pocket; and the defendant Vaughan had a stick of dynamite, a bottle of nitroglycerin, and some fuse and caps. The State's evidence showed that Mr. Clay's death was caused by a gun-shot wound in the neck, which was made by a bullet from a forty-four calibre pistol. The defendants Vaughan and Ryan testified in their own behalf; the defendant Raymond did not testify. Vaughan and Ryan stated that a few days prior to the commission of the homicide in question, they were in the same cell in the prison and agreed with Blake and Raymond to make an effort to escape; that a friend of theirs, whose name they declined to give, had sent them the pistols, cartridges, nitroglycerin, dynamite, etc., which they took for the purpose of frightening the prison officers. They testified that it was distinctly agreed among them

that no one should be hurt or killed; they both testified, however, that they went to the deputy warden's office, and covered him with their pistols; that Blake shot Captain See in the wrist; that they marched with See to the wagon entrance where they and Blake fired their pistols a number of times; that they all ordered Mr. Clay to hold up his hands; that no one else in that hall way had any pistols or revolvers except these four and that Mr. Clay, Judge Allison and Captain See were all shot. Each of the two defendants denied that he shot either Clay or Allison. They expressed the opinion that Blake did it. They admitted that they blew open the outside door with nitroglycerin, passed through the opening, ran west to the freight depot, jumped into a wagon and carried on a running battle with the officers and police and citizens who were pursuing them, and that finally they were captured with their revolvers in their hands. The court gave the same instructions on this trial as on the former trial, save and except, as already noted, that the court gave the instruction that the jury might find one or more of the defendants guilty and others not guilty, as they might deem right and proper under the instructions of the court and the evidence in the case.

1. It is insisted that the court erred in giving the instruction 2 for the State, for the reason that this instruction authorized the jury, if they found that the defendants and another person, named Hiram Blake, entered into the criminal conspiracy to escape from the prison, and while acting in concert with each other, and in the furtherance of a common design to make such escape, either of the said four persons, did in the presence of the other three, wilfully, feloniously, premeditatedly, deliberately and of malice aforethought kill John A. Clay, to find all three of the defendants guilty, because the said Blake was not named in the indictment. The proposition is thus advanced that, in order

to admit testimony as to a conspiracy between the defendant and other persons, such other persons must also be included in the indictment. Both at common law and in this country, the law is well settled adverse to this contention. [State v. Collins, 181 Mo. l. c. 261; State v. Kennedy, 177 Mo. l. c. 164, 165; State v. Boatright, 182 Mo. l. c. 46, and authorities there cited.]

2. It is further contended that the court erred in refusing instructions 7, 8, 9 and 10, asked by the defendants in which the defendants sought to have the court submit to the jury that if the defendants killed Mr. Clay with premeditation, and malice aforethought, but without deliberation, they were only guilty of murder in the second degree. And the further proposition that although the jury might find and believe all three of the defendants and Blake were convicts in the Missouri State penitentiary, and while so confined in said prison, they agreed and combined together to effect their escape therefrom, but it was expressly understood and agreed among them that no officer or guard of the prison should be killed or injured, but that said escape should be effected solely by means of intimidating the officers and guards, and that while said convicts were carrying out their said purpose, the deceased, John A. Clay, was killed by one of said defendants, and that this killing was a departure from the purpose and plan agreed upon by said Blake and the defendants, then the defendant or defendants not so instigating, counseling, abetting, aiding or advising said killing, was not guilty of the offense charged in the indictment, but that the party killing said deceased alone was guilty. These instructions were fully considered on the former appeal in this case, and it was ruled that the court properly refused them on the ground that according to their own testimony, in addition to that of the State, they were

all equally guilty of murder in the first degree and of no less grade of that offense. With the conclusion reached at that time we are entirely satisfied. While it is true that on this appeal the defendants Vaughan and Ryan testified that it was agreed between them that they would make an effort to escape and that a friend of theirs, whose name they refuse to divulge, had furnished them with pistols, cartridges, nitroglycerin, dynamite, etc., to enable them to make their escape, and that it was agreed between them that no officer of the prison should be hurt or killed, still, they testified that each of them went armed with a loaded revolver into the deputy warden's office and without warning to him covered him with their pistols, and that when he attempted to draw his pistol, one of their number, Vaughan, grabbed him by the wrist, and another of them, Blake, shot Warden See through the wrist, and that they together thereupon seized the deputy warden and two visitors, who were then in the office, and compelled him and the visitors to accompany them to the wagon entrance of the penitentiary, and that immediately upon entering this entrance they compelled the deceased, Mr. Clay, to throw up his hands, and then and there one of their number, without the slightest provocation on the part of the deceased, shot and instantly killed him. Not only this, but they shot the deputy warden twice and killed Captain Allison and wounded another guard, Mr. Young, and shot at another guard, Bruner, who was coming to the assistance of the deputy warden. Thus, it appears that their conspiracy was to commit a felony and that in the prosecution of the purpose of that conspiracy they shot and killed two of the officers of the State and seriously wounded another, and under such circumstances the law of this State is that they were each and all of them guilty of murder in the first degree in killing the two guards Clay and Allison, and there is nothing to reduce

their offense to murder in the second degree. [State v. Vaughan et al., 200 Mo. l. c. 19; State v. William Walker, 98 Mo. 95, l. c. 107.]

In view of their own testimony and all the evidence on the part of the State as to their acts and conduct, their statements that they did not intend to hurt or kill any one amounted to nothing in the eyes of the law and was so utterly inconsistent with the physical facts of the case that the circuit court would not have been justified in submitting to the jury that their offense was anything less than murder in the first degree, and this we ruled on the former appeal, and we are still of that opinion.

3. A careful consideration of all the evidence discloses no error in the admission of testimony nor in any rejection of any offered on behalf of the defendants. All questions as to the evidence were fully settled by the opinion of Judge BURGESS on the former appeal, and it is unnecessary to repeat what was said at that time, or to discuss the various authorities so carefully collected by the Attorney-General sustaining our rulings on that occasion.

No error appearing, the judgment of the circuit court is affirmed and the sentences which the law pronounces are directed to be carried into execution. *Fox, P. J., and Burgess, J., concur.*

THE STATE v. THOMAS TOOHEY, Appellant.

Division Two, May 14, 1907.

1. **BURGLARY AND LARCENY: Sufficiency of Evidence.** Evidence in a prosecution for burglary and larceny *held* sufficient to justify the submission of the case to the jury.
2. ———: **Proof of Other Crimes: Common Design: Evidence.** In a prosecution for burglary of and larceny from a certain Pullman car, it was not error to admit evidence tending to show that another car coupled to the former had been burglarized and articles stolen therefrom, the property taken from both cars having been sold at the same time and place by defendant and his coindictree. The evidence tended to show a common design to burglarize both cars, and the two crimes were so closely related that proof of the one tended to establish the other. And, for the same reason, it was not error to permit the State to prove that defendant and his coindictree were seen together on the afternoon of the day on which the crime was committed, in the cab of a locomotive engine, defendant breaking off pieces of brass from the engine, and his coindictree picking them up.
3. ———: **Disposition of Stolen Property: Evidence.** No error was committed in permitting a witness for the State to testify that on the afternoon of the alleged burglary and larceny defendant and his coindictree came to witness's junk shop and sold to him some of the articles alleged to have been stolen. Although the stolen property may have been partly or even exclusively in the possession of defendant's coindictree at the time it was sold, yet defendant's presence was a circumstance tending to show his guilt.

Appeal from Jackson Criminal Court.—*Hon. Jno. W. Wofford, Judge.*

AFFIRMED.

Philip D. Clear for appellant.

(1) The demurrer to the evidence should have been sustained. *State v. Huff*, 164 Mo. 480. (2) The evidence admitted relative to car "Nubia," over defendant's timely objection, was error, because that car is

not mentioned in the information, and because said evidence relates to a separate transaction. *State v. Goetz*, 34 Mo. 85; *State v. Harold*, 38 Mo. 496; *State v. Reavis*, 71 Mo. 419; *State v. Turner*, 76 Mo. 350; *State v. Reed*, 85 Mo. 194; *State v. Tabor*, 95 Mo. 590; *State v. Spray*, 174 Mo. 569; *State v. Jackson*, 95 Mo. 328; *State v. Parker*, 96 Mo. 328; *State v. Crow*, 107 Mo. 346; *State v. Young*, 119 Mo. 495; *State v. Smith*, 125 Mo. 6.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) (a) No error was committed in admitting evidence tending to show that the Nubia had been broken into and bronze hooks stolen from it. Said evidence tended to show a common scheme or plan embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the other. *State v. Bailey*, 190 Mo. 280; *People v. Molineux*, 168 N. Y. 264; *Underhill on Crim. Evidence*, sec. 88; 1 *Wigmore on Evidence*, sec. 306. (b) Neither was error committed in permitting the State to prove that the defendant and his co-indictee were found on the afternoon of the same day, between six and seven o'clock, in the cab of an engine, defendant breaking off pieces of brass and his codefendant gathering them up. This evidence was admissible for the reason given above, and for the additional reason that it tended to identify the defendant. *State v. Walker*, 194 Mo. 262; *State v. Folwell*, 14 Kan. 105; *Yarborough v. State*, 41 Ala. 405; *Underhill on Crim. Evidence*, sec. 91; 1 *Wigmore on Evidence*, sec. 414; 4 *Elliott on Evidence*, sec. 3058; *Bishop's New Crim. Proc.*, 1129. (c) No error was committed in permitting State's witness Epstein to testify that defendant and James Carrigan came to his junk store together about four o'clock p. m. on the day of the alleged larceny, and that they

brought with them the stolen brass and stolen bronze, and sold the same to said witness. These articles were identified as the property stolen from the Bolton and the Nubia, and proof that the defendant and his associate had them in their possession so recently after the larceny thereof, was a strong circumstance tending to show that they had stolen the same. *State v. Scott*, 109 Mo. 228; *State v. Castor*, 93 Mo. 250; *Wharton's Crim. Evid.*, sec. 758; 3 *Greenl. on Evidence*, sec. 32; 4 *Elliott on Evidence*, sec. 2725. Even if the stolen property was partly or exclusively in the possession of defendant's co-indictee, James Carrigan, at the time the same was sold at the junk store, still this recent possession was a circumstance against the defendant, in view of his association with Carrigan on said day, his presence with Carrigan at the junk store, his presence with and participation with Carrigan in the old engine and the denial of his name, when arrested. *State v. Wohlman*, 34 Mo. 482; *State v. Dawson*, 90 Mo. 149. (2) The evidence was sufficient to justify a submission of the case to the jury, and sufficient to justify the jury in finding the defendant guilty.

BURGESS, J.—On the 11th day of September, 1906, the prosecuting attorney of Jackson county filed an information, duly verified, charging the defendant and one James Carrigan with burglariously breaking into and entering a certain railroad car called the "Bolton," the property of the Pullman Company, a corporation, and taking and stealing therefrom certain brass hat and coat hooks and a brass guardrail and other articles of value then and there kept and deposited.

A severance being granted the defendant, he was tried on the 1st day of October, 1906, and convicted of burglary, and his punishment assessed at three years

in the penitentiary. After filing an unsuccessful motion for a new trial, defendant appealed.

The State's evidence tended to prove that on the 7th day of September, 1906, the Pullman Company was the owner of two sleeping cars, one called the "Bolton" and the other called the "Nubia," and that they were coupled together and standing on a side track in the Burlington yards, a little east of the roundhouse in Kansas City. On the morning of that day the doors of both cars were locked and the windows all down. At two o'clock in the afternoon of that day, it was discovered that one of the doors of the Bolton, as also one of the doors of the Nubia, had been broken open, and a number of brass hooks and brass guardrails and several other articles had been torn from their fastenings and removed from the interior of each of said cars, the brass hooks being worth about \$1.50 each. Between six and seven o'clock of the same evening the defendant and his co-indictee, James Carrigan, were discovered by the night watchman in the cab of an old engine in the railroad yards, some distance away from where the cars Bolton and Nubia were standing. Defendant at the time was in the act of breaking off pieces of the brass attachments on the engine, using a hammer and chisel for that purpose, while Carrigan was picking up the pieces of brass that defendant had knocked off. The night watchman arrested the defendant, who on his way to the police station said that his name was Charley Smith, but he afterwards gave his true name. It appears from the evidence that about four o'clock on that afternoon, the defendant and Carrigan went together to a junk shop owned by Epstein & Son, about a quarter of a mile distant from where the two cars were standing, and sold some of the stolen brass hooks and the brass guardrail. The articles in question were identified by several officers and employees of the Pullman Company as the stolen property.

On behalf of the defendant, his aunt and his grandmother both testified that he was at home the afternoon of the day of the alleged burglary and larceny until four o'clock, when he left the house and did not return that evening.

Defendant contends that the demurrer to the evidence at the close of the State's case should have been sustained. It is true, the evidence was circumstantial, but it was sufficient to justify the submission of the case to the jury. The burglary was committed between two and four o'clock on the afternoon of the seventh of September, and the fact that the property taken from the cars was sold to a junk dealer about four o'clock of the same afternoon by the defendant and his accomplice tended strongly to establish the defendant's guilt. The property having been shown to have been in the possession of defendant and his companion shortly after the burglary and larceny was committed, raised the presumption that the defendant was guilty of the burglary and larceny. [State v. James, 194 Mo. 268.] Not only this, but it was further shown that the defendant and this same companion were seen, between six and seven o'clock the same afternoon, engaged in committing the same sort of larceny. True, the defendant offered evidence tending to prove an alibi; but the weight of the evidence was for the consideration of the jury. [State v. Smith, 190 Mo. 706.]

We are of the opinion that no error was committed in admitting evidence tending to show that the car called Nubia had been broken into and brass hooks and other articles of brass stolen therefrom. The two cars, Bolton and Nubia, were coupled together and were evidently burglarized about the same time, and the property taken from them was sold at the same time and place by the defendant and his co-indictee. The evidence tended to show a common design, scheme or

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plan, to burglarize both cars for practically the same purpose, and the two acts of burglary and larceny were so closely related to each other that proof of the one tended to establish the other. [State v. Bailey, 190 Mo. 257; People v. Molineux, 168 N. Y. 264; Underhill on Criminal Evidence, sec. 88; 1 Wigmore on Evidence, sec. 306.] Nor was there error committed in permitting the State to prove that the defendant and his co-indictee were seen together between six and seven o'clock in the afternoon of the same day, in the cab of a locomotive engine, the defendant breaking off pieces of brass from the engine, and James Carrigan, his co-indictee, picking them up. [State v. Walker, 194 Mo. 253; State v. Folwell, 14 Kan. 105; Yarborough v. State, 41 Ala. 405; Underhill on Criminal Evidence, sec. 91; 1 Wigmore on Evidence, sec. 414; Elliott on Evidence, sec. 3058; Bishop's New Crim. Proc., 1129.]

No error was committed in permitting Abe Epstein, a witness for the State, to testify that the defendant and James Carrigan came to his junk shop together about four o'clock in the afternoon of the day of the alleged burglary and larceny and that they brought with them the brass articles alleged to have been stolen, and sold the same to him. These articles were identified as the property taken from the Bolton and Nubia, and the fact that defendant and Carrigan had them in their possession was an important fact as tending to show that they were the thieves. [State v. Scott, 109 Mo. 226; State v. Castor, 93 Mo. 242.] And when a burglary and larceny are committed at the same time, the law indulges the presumption that the person in whose possession the stolen property is recently thereafter found is guilty of the burglary as well as of the larceny. [State v. Warford, 106 Mo. 55.] Although the stolen property was partly or even exclusively in the possession of James Carrigan at the time it was purchased from him and the defendant by the junk

dealer, yet his presence and association with Carrigan at the junk store and at the time of the sale, his participation with Carrigan in the work of breaking off and stealing the brass attachments of the old engine, and his denial of his name when arrested, were all circumstances which tended to establish defendant's guilt. [State v. Wohlman, 34 Mo. 482.]

A final contention is that the court committed error in permitting the prosecuting attorney, in his closing address to the jury, over the objections of defendant, to go outside the record and make statements which were not warranted or authorized by the evidence, to the prejudice of the defendant; but after a careful reading of the remarks complained of, we are of opinion that there is nothing in them of which defendant has just cause to complain; certainly, nothing which would justify a reversal of the judgment.

Finding no reversible error in the record, the judgment is affirmed.

All concur.

THE STATE v. GROVER KEENE, Appellant.

Division Two, May 14, 1907.

NO BILL OF EXCEPTIONS. Where there is no bill of exceptions, and the record proper is free from error, the judgment will be affirmed.

Appeal from Platte Circuit Court.—*Hon. A. D. Burnes*, Judge.

AFFIRMED.

Herbert S. Hadley, Attorney-General, for the State.

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FOX, P. J.—This cause is here upon an appeal by the defendant from a judgment of the circuit court of Platte county, convicting him of an assault with intent to kill, upon which conviction he was sentenced to the penitentiary for a term of two years.

There was no bill of exceptions filed in this cause and the time given the defendant to file the same has long since expired; therefore, there is nothing before this court except the record proper. We have examined the information and it is in proper form and sufficiently charges the offense of which the defendant was convicted. The record shows the waiver of formal arraignment and plea of not guilty and the trial proceeded regularly before a jury and they returned their verdict finding the defendant guilty as charged, and upon the failure of the jury to agree upon the punishment assessed, the court fixed the punishment, in conformity with the statute, at imprisonment in the penitentiary for a period of two years. It is conceded by the defendant and his counsel that the record before us is without error; therefore, there is nothing left to be done except to affirm the judgment of the trial court, and it is so ordered.

All concur.

THE STATE v. G. A. PAUL, Appellant.

Division Two, May 14, 1907.

1. **BILL OF EXCEPTIONS: Expiration of Time: Extension Thereafter: Judge Absent.** The authority of a judge to sign a bill of exceptions in vacation and make it a part of the record, is purely statutory in this State. After the expiration of the time granted within which to file a bill of exceptions, neither the court nor the judge in vacation can extend it, and a bill of exceptions filed in pursuance of such a void order will not be considered on appeal. And this is true, notwithstanding the judge is absent from the State when the bill of exceptions is delivered at his chambers within the time allowed.

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2. INFORMATION: Forgery: Promissory Note. An information, set out in the opinion, charging forgery of a promissory note, held sufficient.

Appeal from Lawrence Circuit Court.—*Hon. Hugh Dabbs*, Judge.

AFFIRMED.

Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney General, for the State.

(1) The information, which was accompanied by the affidavit of the prosecuting attorney, is sufficient in form and substance. *Kelley's Crim. Law*, sec. 773; *State v. Flora*, 109 Mo. 295; *State v. Karlowski*, 142 Mo. 465. (2) There is nothing before this court, except the record proper, the bill of exceptions not having been filed within the time allowed. It is hardly necessary to argue that, after the time had expired, the trial court had no authority to make any order whatever in reference to the filing of the bill of exceptions. *State v. Eaton*, 191 Mo. 151; *State v. Thompson*, 149 Mo. 439; *State v. Britt*, 117 Mo. 584; *State v. Wilson*, 98 S. W. 68. The court had no power or authority to make an order *nunc pro tunc* filing a bill of exceptions, after the time for filing had expired, especially in the absence of notice to the adverse party. *Musick v. Railroad*, 124 Mo. 544; *Maddox v. Railroad*, 73 Mo. App. 510; *State v. Britt*, 117 Mo. 586; *Powell v. Sherwood*, 162 Mo. 605.

Parker Potter and *James A. Potter* for appellant in reply.

The cases cited by respondent in support of the second proposition in which it is urged that there is no bill of exceptions in this case, are not in point for the reason that they all refer to cases where the bill of exceptions was not presented to the trial judge within the time allowed. The authorities all hold that where the

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bill of exceptions is presented to the trial judge within the time prescribed, the rights of appellant or plaintiff in error will not be prejudiced by the judge's delay in signing it. Especially is this true when the absence of the judge from the State makes it impossible for the appellant to have his bill signed at the proper time. *Swem v. Green*, 9 Colo. 358; *Classer v. Hackett*, 37 Fla. 358; *Loud v. Prichett* 104 Ga. 648; *Olds v. Railroad*, 165 Ill. 472; *Railroad v. Morrison*, 160 Ill. 288; *Weber v. Ins. Co.*, 80 Ill. App. 390; *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Robinson v. Anderson*, 106 Ind. 152; *Toner v. Railroad*, 58 S. W. 439; *Chenault v. Quisenberry*, 19 Ky. L. Rep. 1632, 43 S. W. 717; *Linaham v. Barley*, 124 Mo. 560; *Field v. Gellerson*, 80 Me. 270; *Cochrane v. Little*, 71 Md. 323; *Browne v. Hale*, 127 Mass. 158; *People v. Judge of Sup. Court*, 41 Mich. 726; *McGee v. Beall*, 63 Miss. 455; 3 *Cyclopedia Law and Procedure*, 44.

GANTT, J.—The prosecution in this cause was begun by the filing of an information by the prosecuting attorney of Lawrence county, duly verified, charging the defendant with forgery. The information contained thirteen counts, but all of these were dismissed except the third, which is in the following form:

“In the circuit court of Lawrence county, State of Missouri.

“State of Missouri, Plaintiff, vs. G. A. Paul, Defendant.

“Harvey Davis, prosecuting attorney, in and for the county of Lawrence, in the State of Missouri, acting herein upon information and belief, informs the court that one G. A. Paul, at the county of Lawrence, in the State of Missouri, on the 25th of May, 1904, unlawfully and feloniously did forge, counterfeit and falsely make a certain instrument, in writing, to-wit, a certain promissory note, purporting to be the act of one

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J. R. Reed, by which a pecuniary demand and obligation for the payment of sixty-two and 65-100 dollars by the said J. R. Reed to G. A. Paul, or order, ninety days after date purported to be created, which said forged, counterfeit and falsely made instrument, in writing, to-wit, the said promissory note, is of the tenor following, that is to say:

“\$62.65 Aurora, Mo., 5-25-1904.

“Ninety days after date I promise to pay to G. A. Paul, or order, sixty-two and 65-100 dollars for value received with eight per cent interest per annum thereon from date, which interest shall be due and payable annually, and if the interest thereon be not paid annually or when due, the same shall, when due, be added to and become a part of the principal and bear interest at the same rate.

“(Signed) J. R. REED. Post Office—City.”
with intent then and there and thereby, unlawfully and feloniously to injure and defraud, against the peace and dignity of the State.

HARVEY DAVIS,

“Pros. Atty.

“Harvey Davis, prosecuting attorney, makes oath and says that the facts stated in the above and foregoing information are true according to his best information and belief.

HARVEY DAVIS.

“Subscribed and sworn to before me this 18th day of October, 1905.

“(Seal) M. B. GARDNER, Circuit Clerk.”

The regular judge of the court was disqualified and Honorable Hugh Dabbs, judge of the Jasper Circuit Court, was called in to try the cause, and at the December term, 1905, the trial was had and the defendant convicted and his punishment assessed at imprisonment in the state penitentiary for a term of two years. In due time he filed his motions for a new trial and in arrest of judgment, both of which were overruled, and he

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duly excepted. Thereupon, the court sentenced him in accordance with the verdict of the jury; from that judgment and sentence he has appealed to this court. At the same term he was given leave to file a bill of exceptions on or before the 20th day of February, 1906. On February 20, 1906, the time for filing his bill of exceptions was extended by a proper order signed by Judge Dabbs until April 20, 1906. On April 19, 1906, the time was extended by proper order until June 20, 1906. Again, on June 16, 1906, the time for filing the bill was extended for sixty days from that date. On August 15, 1906, the prosecuting attorney and the defendant's attorney signed and filed a stipulation in accordance with the statute extending the time for filing the bill to August 20, 1906. No further extensions were granted either by the court or by agreement of counsel filed with the clerk, but on the 15th of December, 1906, a bill of exceptions was signed and filed. At the time the bill was signed, in the vacation of court, Judge Dabbs made the following order: "That thereafter, on the 15th of August, 1906, said bill of exceptions was delivered at the chambers of the undersigned special judge in the above-entitled cause and within the time heretofore allowed by a former order of the court, and on account of the absence of special judge from the State of Missouri, it was impossible for the defendant to have said bill of exceptions signed within the time allowed. It is therefore ordered by the undersigned special judge in said cause that said bill of exceptions, which by order of the court should have been filed on or before the 20th of August, 1906, be and the same is hereby signed and sealed, and the circuit clerk of Lawrence county, Missouri, is hereby ordered to file the same as of that date and that the same may be made a part of the record in this cause. Given under my hand this 10th day of November, 1906, at chambers in the city of Joplin, Missouri. Hugh Dabbs, special judge."

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This bill was endorsed by the clerk of the Lawrence Circuit Court as follows: "State of Missouri vs. G. A. Paul, defendant. State of Missouri, County of Lawrence, ss. On this 15th day of December, 1906, by the order of the Honorable Hugh Dabbs, special judge, I hereby file the within bill of exceptions as of date of August 20, 1906. M. B. Gardner, circuit clerk."

Various errors are assigned for the reversal of this cause both in the oral argument and in the brief of counsel filed in behalf of defendant.

1. At the outset, the question arises as to what errors this court can review in the state of the record before us. It is insisted by the Attorney-General that there is nothing before the court except the record proper, because the bill of exceptions was not filed within the time allowed by the court. On the other hand, it is urged by the learned counsel for the defendant that, inasmuch as he presented the bill of exceptions at the chambers of Judge Dabbs, who presided in the cause, on the 15th of August, 1906, and Judge Dabbs was at that time absent from the State and did not return until after the time allowed for signing the bill, the bill should be considered as a part of the record. The authority of a judge of the court to sign a bill of exceptions in vacation, and making it a part of the record, is purely statutory in this State. The same rule prevails in both criminal and civil cases. [R. S. 1899, sec. 728.] In the construction of that statute, it has been uniformly ruled by this court that where the period beyond the trial term of court granted by the court in which to file a bill of exceptions, has expired, neither the court nor judge in vacation can extend it, and the bill of exceptions filed in pursuance of such a void order will not be considered on appeal. [State v. Scott, 113 Mo. 559; State v. Apperson, 115 Mo. 470; Powell v. Sherwood, 162 Mo. l. c. 611, and cases there cited.] Accordingly, it must be ruled that the bill of

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exceptions signed by Judge Dabbs on the 10th of December, 1906, and filed in the office of the clerk on the 15th of December, 1906, is no part of the record before us and the matters of exception therein cannot be considered on this appeal, and we must, therefore, look to the record proper for reversible errors.

2. Looking, then, to the record, proper, we discover no valid objection to the form of the information. The information charges an offense under section 2009, Revised Statutes 1899; the record is entirely free from error in the arraignment of the defendant, the impanelling of the jury, the return of the verdict and the sentence of the court. No error appearing, the judgment of the circuit court must be and is affirmed.

Fox, P. J., and Burgess, J., concur.

Ex Parte IKE FOISTER.

Division Two, May 14, 1907.

1. **PAROLE OF PRISONER: After Appeal and Affirmance of Judgment.** The circuit court, after an appeal by a convicted defendant and an affirmance of the judgment, and a direction by the Supreme Court that the sentence pronounced by the circuit court be executed and that the marshal arrest defendant and deliver him to the warden of the penitentiary, has no power to parole defendant. Nor does the circuit court, between the time of the affirmance of the judgment and the arrest of defendant, have power to parole him. The statute expressly provides that the Supreme Court, when a judgment of conviction is affirmed, shall direct that the sentence pronounced below shall be executed.
2. ———: ———: **Repeal by Implication: Appeal Pending.** Section 2827, Revised Statutes 1899, providing that no parole shall be granted in any case while an appeal is pending, did not by implication confer power on the circuit court to grant a parole after affirmance of the judgment, when the appeal is no longer pending. That provision did not, by implication, repeal the provisions of section 2705 which expressly requires the Supreme Court, when a judgment is affirmed, to direct that the judgment of the trial court be executed.

Ex parte Folster.

Habeas Corpus.**PETITIONER REMANDED.**

G. W. Thornberry and Delaney & Delaney for petitioner.

(1) The appeal from the judgment of the circuit court of Stone county, while it vested jurisdiction in the Supreme Court to determine the cause, only suspended the judgment of the trial court. On affirmance, the judgment of the Supreme Court is merely an order directing the sentence of the lower court to be executed. It is the judgment of the lower court that is executed, and the authority of the warden of the penitentiary is the judgment of the lower court. Secs. 2662, 2718, R. S. 1899. (2) It therefore follows that the jurisdiction of the circuit court is not destroyed but merely suspended. On receipt of the mandate from this court, the jurisdiction of trial court by virtue of the statute reattaches for sentence, but by every principle of law and equity it attaches for all purposes. *State v. Way*, 40 S. C. 297; *Ex parte Gray*, 77 Mo. 160; *Ex parte Toney*, 11 Mo. 661; *Ex parte Jones*, 41 Cal. 209; *People v. Walters*, 1 Idaho 274. (3) The effect of affirmance is merely to remove the bar of executing the sentence of the lower court. *Matthewson v. Railroad*, 44 Mo. App. 99. (4) By virtue of the parole law, the trial court has full and complete jurisdiction to grant a parole. (5) The circuit court of Stone county having granted a parole, such parole can only be revoked for breach of conditions. It is in the nature of a conditional pardon. *U. S. v. Hughes*, 1 Bond (U. S.) 574. And is effective as an absolute pardon until the conditions are broken. 1 Bish., New Crim. Law, sec. 914; *Flavell's case*, 8 Watts & S. 197; dissenting opinion of Judge Hunt in *Carr v. State*, 19 Tex. App. 653.

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Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for respondent.

(1) After petitioner's trial and conviction, and after he had been granted an appeal, the circuit court of Stone county had no further jurisdiction in his case. True, that court possessed the authority to make an order *nunc pro tunc*, correcting the records; and also power to approve of and file a bill of exceptions, leave thereof having been given in term, but that court had no power or authority to take any action regarding said case. Our statute provides that when a defendant appeals and the judgment is affirmed, the Supreme Court shall direct that the sentence pronounced be executed, shall order the marshal to arrest the defendant and deliver him to the warden of the penitentiary. R. S. 1899, secs. 2705, 2718, 4286, 4298; *State v. Paxton*, 126 Mo. 516; *State v. Anderson*, 126 Mo. 547; *State v. Anderson*, 98 Mo. 474; *State v. Pagels*, 92 Mo. 317; *State v. Blunt*, 110 Mo. 344. (2) The power to parole is purely a statutory one, and the statute limits that power to the time after the conviction of a defendant, and prior to his taking an appeal. R. S. 1899, sec. 2827.

FOX, P. J.—This is an application for a writ of habeas corpus, the petitioner, Ike Foister, being unlawfully restrained of his liberty, so he alleges, by the warden of the State penitentiary, who holds petitioner, as a prisoner, in said penitentiary.

The return admits the official position of the warden, and also admits that he holds the petitioner and deprives him of his liberty, and pleads a certain conviction, judgment and sentence of the circuit court of Stone county, rendered at the October term, 1905, whereby the petitioner was convicted of the crime of felonious assault, and sentenced to two years in the penitentiary. The return also alleges that the peti-

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tioner was granted an appeal from said conviction, judgment and sentence to the Supreme Court of Missouri; and that said Supreme Court affirmed the judgment of said circuit court on the fifth day of March, 1907. That, in pursuance of said judgment of affirmance, the clerk of said Supreme Court issued a commitment, directed to the marshal of said court, commanding the marshal to take the body of the petitioner and deliver him to the warden of the penitentiary; and that said marshal took the body of the petitioner into his custody and delivered the petitioner to the warden of the penitentiary. The return further alleges that the action of the circuit court of Stone county, on the 11th day of March, 1907, in making an order for the parole of the petitioner, was illegal and void, and in violation of section 2827, Revised Statutes 1899.

A demurrer challenging the sufficiency of the return and again praying for the discharge of the prisoner, notwithstanding the allegations embraced in the return, was treated and considered as being filed.

OPINION.

The record before us in this proceeding discloses but one question; that is in respect to the power of the circuit court of Stone county to parole the petitioner under the provisions of article 14 of chapter 16 of the Revised Statutes of 1899, relating to the parole of prisoners. The defendant in this cause was convicted in the circuit court of Stone county at the October term, 1905, of the crime of felonious assault and sentenced to two years in the penitentiary. From this judgment of sentence he was granted an appeal to the Supreme court of Missouri and this court on the 5th day of March, 1907, affirmed the judgment of the circuit court, and in conformity to the provisions of section 2705, directed the sentence pronounced in the circuit court to be executed, and in carrying out such provisions the

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Supreme Court, under the express provisions of the section above cited, ordered the marshal of said court to arrest the petitioner and deliver him to the proper officer of the penitentiary. The circuit court of Stone county, prior to the execution of the process directed to the marshal of this court, undertook by an entry of record to parole the prisoner under the provisions of the article heretofore designated.

The crucial question confronting us is this, did the circuit court possess such power? The power of the circuit court to parole is embraced in the provisions of section 2817, Revised Statutes 1899, which provides: "When any person under the age of twenty-five years shall be convicted of any felony, except murder, rape, arson or robbery, and imprisonment in the penitentiary shall be assessed by the court or jury as a punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole shall be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

Section 2827, Revised Statutes 1899, provides that "no parole shall be granted in any case while an appeal is pending, nor shall the action of any court or judge in granting or terminating a parole be subject to review by any appellate court."

As applicable to the question presented by the record in this cause and bearing directly upon it, are sections 2718, 2705 and 2706, which provide:

"Sec. 2718—When the appeal is taken, or the writ of error is sued out of by the party indicted, if the Supreme Court affirm the judgment of the court below it shall direct the sentence pronounced to be executed, and

the same shall be executed accordingly; if the judgment be reversed, the Supreme Court shall direct a new trial, or that defendant be absolutely discharged, according to the circumstances of the case.

“Sec. 2705—In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the Supreme Court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the Supreme Court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary.

“Sec. 2706—Where the Supreme Court shall make an order, as directed in the last preceding section, the clerk of the court shall forthwith deliver a certified copy of such order to such marshal, who shall without delay, either in person or by such assistants as the Supreme Court may direct, arrest such convict wherever he may be found in this State, and transport him to the penitentiary, and deliver him to the proper officer thereof.”

It is earnestly insisted by learned counsel for petitioner that the action of the circuit court in paroling the prisoner was proper, and was authorized under the provisions of the statute relating to the parole of prisoners, and that the prisoner is illegally restrained of his liberty by the warden of the penitentiary, which restraint was predicated upon the process issued by this court to its marshal after the affirmance of the judgment. We are unable to give our assent to this insistence. The procedure in this cause after the appeal was granted to the Supreme Court of this State is plainly and expressly provided for by the provisions of sections 2718 and 2705. Under the provisions of those sections it was the duty of this court, if the judgment

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of the lower court was affirmed, to direct such judgment to be executed, and then follows the provision that this court shall direct its proper officer to execute such judgment. While it may be said that article 14, relating to the parole of prisoners, is a subsequent statute to those providing for the execution of the order of this court of a judgment of an inferior court, yet it is clear, unless there is some express provision limiting the power of this court in accordance with the provisions of sections 2718 and 2705 to execute the judgment of the lower court, the inferior court which rendered the judgment would be powerless to interfere with the proper enforcement of that judgment in accordance with the provisions of the sections heretofore indicated.

It is very earnestly and ably argued by counsel for the petitioner that the proviso in section 2817, which provides that the court shall have no power to parole any prisoner after he has been delivered to the warden of the penitentiary, by implication confers the power upon such court to enter such order of parole before the prisoner has been delivered to the warden of the penitentiary. That section is only susceptible of one reasonable construction, and that is that it is only applicable where the proceeding is entirely confined to the circuit court. In other words, it simply means that if a defendant is convicted and held for some days before the sheriff conveys him to the penitentiary, at any time before he is delivered to the warden the circuit court may exercise the power of parole, but after the judgment and sentence has been executed and the sheriff has delivered him to the warden, then such proviso is a limitation upon such power. But that section has no application to cases pending in the Supreme Court upon appeal, where, under the plain and express provisions of the statute, it is made the duty of this court, where the judgment is affirmed, to take all necessary steps to enforce the execution of that judgment.

Again, it is insisted that the provisions of section 2827, which provides that no parole shall be granted in any case while an appeal is pending, by implication confers power upon the circuit court to grant a parole if the appeal is not pending. In other words, the insistence is that the power of the Supreme Court expressly given by the provisions of section 2705 to direct the execution of the judgment of the circuit court, can be limited by implication. We are unwilling to give our assent to this insistence. That the Legislature, by the provisions of section 2827, never intended to curtail or limit the power of the Supreme Court to enforce the judgment of the circuit court, when such judgment was affirmed, in our opinion is too plain for discussion.

Where a defendant is convicted by the circuit court and judgment of sentence that he be confined in the penitentiary, and an appeal is granted from that judgment to the defendant, under the provisions of sections 2718 and 2705, as heretofore pointed out, the power to execute and enforce that judgment by due process directed to the marshal of the Supreme Court, is transferred by operation of the statute to the Supreme Court, and in our opinion such power should not be and cannot be curtailed or limited by mere implication. To hold that the power of the Supreme Court in the affirmance of judgments of the character now under consideration, is limited by implication, would simply place the jurisdiction of appellate and inferior courts in an inextricable state of confusion, and this court would find itself in the anomalous position of being unable to follow the directions of plain provisions of the statute in the enforcement of the judgments of the circuit courts which are affirmed until it could first ascertain as to whether or not after such judgment of affirmance the circuit court would again assume jurisdiction and discharge the prisoner upon parole. We are un-

willing to give the sections of the statute applicable to this question any such construction.

We have thus indicated our views upon the legal proposition disclosed by the record, which results in the conclusion that the petitioner is not illegally restrained of his liberty, and it is therefore ordered that he be remanded to the custody of the warden of the State penitentiary, by him to be dealt with according to the provisions of law.

All concur.

THE STATE v. J. T. SMITH, Appellant.

Division Two, May 14, 1907.

1. **WITNESS: Deaf Mute.** A deaf and dumb girl, the prosecutrix in a trial of defendant for rape, is a competent witness for the State.
2. **——: Expert: Bias.** The assistant superintendent of the Deaf and Dumb Institute where prosecutrix was educated, is peculiarly fitted to communicate with her by signs and to interpret her testimony to the jury; and whether or not he was unduly biased in her favor is a matter for the determination of the trial court, and if there is no ground for charging the court with a lack of proper discretion in the matter, the verdict will not be interfered with on that assignment.
3. **——: Rape: Deaf Mute.** The taking of a deaf and dumb girl, seventeen years old, in intelligence and playful conduct like a child less than eleven years of age, to a hotel, and there registering her as the wife of defendant, and having her assigned to the same room and bed with defendant, and deflowering her during the night, is rape.

Appeal from Barry Circuit Court.—*Hon. F. C. Johnston*, Judge.

AFFIRMED.

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Herbert S. Hadley, Attorney-General, and *N. T. Gentry*, Assistant Attorney-General, for the State.

(1) (a) No error was committed in permitting Prof. D. C. McCue to act as interpreter, during the examination of the prosecutrix, who was deaf and dumb. After the officers of the Deaf and Dumb Institute learned that one of their pupils had been mistreated while trying to find her way home, Prof. McCue was sent to Barry county to ascertain the facts and to lay them before the prosecuting attorney. This was simply the duty of said officers, and their action in this matter was not only proper but highly commendable. But, the fact that an officer does his duty, and does it promptly, is no proof that he is prejudiced. In a murder case, where the interpreter was a witness for the people and was the deputy sheriff who had arrested the defendant, it was held that it was proper for him to act as an interpreter. *People v. Ramirez*, 56 Cal. 533; *Railroad v. Shenk*, 131 Ill. 283. And the United States Court of Appeals decided that a sister of the plaintiff, who also testified as a witness for the plaintiff, was competent to act as an interpreter for some of the plaintiff's witnesses. *Barber v. Odasz*, 57 U. S. App. 129. The fact that McCue was a friend of prosecutrix and her instructor at the Fulton school did not disqualify him. In a seduction case, the prosecuting witness being a mute, the court held that a lady friend of hers was a suitable person to act as interpreter; and the fact of their friendship did not disqualify her. *State v. Burns*, 78 N. W. 681; *Swift v. Applebone*, 23 Mich. 252. (b) The Supreme Court of Connecticut said that, even though the prosecutrix, who was deaf and dumb, could communicate her ideas in writing, it was proper for the trial court to procure the services of a teacher from a deaf and dumb school to interpret her testimony. *State v. DeWolf*, 8 Conn. 93; *State v. Howard*, 118 Mo. 143;

Whart. Crim. Ev., sec. 375; State v. Weldon, 39 S. C. 322. (2) In arriving at the question of whether or not defendant was guilty, the jury had a right to take into consideration the mental strength of prosecutrix, also the facts that she was seriously afflicted, could not talk, could not hear, and could make almost no noise. State v. Cunningham, 100 Mo. 382; Stephen v. State, 11 Ga. 239; State v. Atherton, 50 Iowa 191; Ebuhart v. State, 134 Ind. 651; State v. McDonough, 104 Iowa 6; State v. Huff, 164 Mo. 480; State v. Williams, 149 Mo. 496; People v. Griffin, 117 Cal. 583; State v. Hann, 73 Minn. 140. Resistance in each case is expected to be only such that the assaulted female is capable of giving, considering the time, place, surroundings, her strength and that of her assailant. 4 Elliott on Evidence, sec. 3097; Underhill on Crim. Evid., sec. 407; Ransbottom v. State, 144 Ind. 257.

GANTT, J.—The prosecution in this case was commenced by an information filed by the prosecuting attorney of Barry county, duly verified, on August 22, 1905, wherein he charged the defendant with rape on Ada Stotts, a female, seventeen years of age, in Barry county, in the month of June, 1905.

The information is sufficient in form and substance and it is unnecessary to reproduce it.

The defendant was arrested and duly arraigned at the September term, 1905, of the Barry Circuit Court, and on his application the cause was continued to the February term, 1906. At said February term the defendant was put upon trial and convicted and his punishment assessed by the jury at fourteen years in the penitentiary. In accordance with the verdict, the defendant was sentenced to the penitentiary, and from that sentence he has appealed to this court.

The State's evidence tended to prove that Ada Stotts, the prosecuting witness, is deaf and dumb and

has been thus afflicted ever since she was two years old. At the time of the commission of the crime charged, June 8, 1905, she was seventeen years old; although in intelligence she was more like a child. The mother of prosecutrix testified that she was like a child eight years old in intelligence; the assistant superintendent of the Deaf and Dumb Institute at Fulton testified that she was like a child eleven years old in intelligence, and the physician, who examined her, gave it as his opinion that she was like a child nine or ten years old in intelligence. Although seventeen years old, prosecutrix would follow her mother around like a small child, and would sit down, dress a doll and play with a doll by the hour. For some months prior to June, 1905, prosecutrix had been attending the Deaf and Dumb Institute at Fulton; and, at the close of the school year, she returned to her home. Prosecutrix was then living with her father and mother southwest of Stotts City, a little town in the western part of Lawrence county. She was accompanied from Fulton by a teacher and other pupils of that school as far as Springfield; there she was placed in charge of the passenger conductor on the Frisco railroad. Prosecutrix had a ticket to Sarcoxie, which was the station where her relatives were to meet her, but by a mistake she did not change cars at Pierce City, and was carried on to Ritchey, in Newton county. At Ritchey the conductor took prosecutrix into the depot and placed her in charge of the station agent, she being a stranger and never having traveled over that road before. Prosecutrix was then crying, frightened and suffering from a severe headache. The station agent took prosecutrix to the Sanders hotel, and introduced her to Mrs. Sanders, the landlady. Prosecutrix took dinner and supper at the hotel, and met the defendant who was boarding there. Defendant represented to Mrs. Sanders and also to the station agent that he was an old friend of the Stotts family, and

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offered to take care of prosecutrix; he did not tell prosecutrix that he was acquainted with her people. During the afternoon, defendant took prosecutrix to a drug store, where he purchasd some ice cream for her, also some candy and medicine. At defendant's suggestion, prosecutrix ate the ice cream and candy and took the medicine; this was behind the partition at the back of the drug store. Then defendant kissed prosecutrix and tried to take improper liberties with her, but she struck his hand. Defendant, who seems to have been a good scribe and who talked to prosecutrix by writing, persuaded prosecutrix to go to Monett, to have a good time, and she consented to go with him. Accordingly, the two left Ritchey about 7:30 p. m., and arrived at Monett about nine of the same evening. Before leaving the hotel at Ritchey, the defendant changed his clothes, put on a clean collar and tie and told Mrs. Sanders that he was going to a party out in the country. Mrs. Sanders accused him of intending to go off on the train with prosecutrix, but defendant denied it, saying that he was going to a party. Mrs. Sanders said, "You are old enough to see after that girl; you could take care of her and see that she gets home all right, but I don't know whether you will do it or not." On arriving at Monett, defendant and prosecutrix went straight to the hotel, where the defendant registered under the name of "Mr. and Mrs. Lawrence." Defendant asked Mr. Swartzell, the proprietor of the hotel, for a room and was assigned to room twelve, which was a front room. Mr. Swartzell went with defendant and prosecutrix up to that room, lighted a lamp for them, and soon returned with a pitcher of water. Prosecutrix testified that she was surprised to see that there was only one bed in the room; that she sat down and began to cry, and wrote to defendant that she wanted to go home. Defendant told her to take off her clothes and get in bed, and she, being

frightened, did so. Defendant looked angry and tried to compel prosecutrix to yield to him, but she wrapped herself up in a sheet and tried to bite him. Finally, defendant forcibly had sexual intercourse with her, and repeated the same during the night. Prosecutrix made as much noise as she could, but on account of a goiter, her throat and voice were very weak. Prosecutrix and defendant remained in that room all night, arose the next morning about eight and went down to breakfast. After eating they took the train for Pierce City, where prosecutrix was met by her father and cousin, and the defendant was arrested. In the course of a few days, Dr. King made an examination of prosecutrix and found that the hymen had been ruptured and that her parts were badly bruised and swollen; and the mother testified to the injured condition of prosecutrix. The State's evidence also showed that the town of Monett is on the line between Barry and Lawrence counties, but that the Swartzell hotel is situated in Barry county.

The defendant admitted having sexual intercourse with prosecutrix in the hotel at Monett on the night in question, but denied using any force or threats. Defendant introduced some physicians who testified that some deaf and dumb persons are equally as intelligent as persons of the same age, not so afflicted. He proved by Mr. Swartzell that he noticed nothing unusual in the conduct of either the defendant or prosecutrix the night they came to his hotel, and nothing unusual at the table the next morning. Mr. Swartzell also testified that he and his wife sat out on the front porch that night till 10:30 and heard no noise in the defendant's room, which was a front room of the second story. This witness further testified that he observed nothing unusual in this bedroom the next morning; that the sheets were wrinkled about as they ordinarily are. He further stated that, although he saw prosecutrix that night and the next morning, and waited on her at the

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table the next morning, he did not know that she was deaf and dumb.

The court instructed the jury fully on all the points of law arising under the evidence in the case and as they are such as have often met the approval of this court it is deemed unnecessary to burden this opinion with their reproduction. No brief having been filed in this court on behalf of defendant, we have been compelled to examine the record in the light of the motions for a new trial and in arrest of judgment:

1. As already said, the information sufficiently charges the offense of rape. [State v. Dilts, 191 Mo. l. c. 667.]

2. No error was committed by the court in permitting the prosecuting attorney to state to the jury in opening the case that he expected to show to the jury that the knowledge of the prosecutrix is limited, that she compares in information with a girl between ten and eleven years of age, but if there had been, this is not assigned as error in the motion for new trial.

3. It was assigned as a ground for new trial that the court erroneously permitted Prof. McCue of the State Deaf and Dumb Institution at Fulton, to act as interpreter of the prosecutrix. That he was peculiarly fitted to communicate with the prosecutrix by signs and interpret her evidence to the jury is not controverted, but it is said that he was unduly biased in her favor. This was a matter for the determination of the circuit court and we see no ground for charging that court with any want of proper discretion in the matter.

That the prosecutrix was under our laws a competent witness was settled in State v. Howard, 118 Mo. l. c. 143 and 144; 5 Am. and Eng. Ency. Law (1 Ed.), 119, and cases cited; State v. Burns, 78 N. W. 681; Swift v. Applebone, 23 Mich. 252.]

4. As to the other objections to testimony we

have carefully read the record and find no reversible error.

5. This record reveals a deplorable picture of human depravity. The ruining and deflowering of the poor deaf and dumb girl under the facts and circumstances detailed in evidence was rape within the meaning of our laws and the jury were fully justified in reaching the verdict they did.

The judgment is affirmed. *Fox, P. J., and Burgess, J., concur.*

JOSEPHINE RIEGEL SOTEBIER v. ST. LOUIS
TRANSIT COMPANY, Appellant.

Division Two, May 14, 1907.

1. **INSTRUCTIONS: Assumption of Uncontroverted Fact: Loss of Wages.** The instructions may assume the truth of a proposition which is established by the undisputed evidence. And so, where the undisputed evidence was that plaintiff at the time of her injuries was receiving twelve dollars per month and her board, and there was no evidence that her services were not reasonably worth that, and there was no evidence that she had been able to perform any labor or earn any wages since the accident, it is not error to instruct the jury to allow her for loss of her wages.
2. ———: **Medical Expenses Incurred.** It is the debt incurred by plaintiff for necessary medical attention, and not its payment, that establishes defendant's liability to pay in personal injury cases. It is unnecessary to allege payment. But where the petition charges that plaintiff "has expended and will be required to expend large sums of money for hospital fees, nurses, doctor's bills, and medicines," she is entitled to recover not only for those she has already paid, but the reasonable value of the services already necessarily rendered and not paid for, and also the reasonable value of services necessary in the future.
3. ———: ———: **In Future: Evidence.** Evidence showing that plaintiff is a hopeless paralytic as the result of her injuries, and would constantly grow worse, was evidence to authorize a

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clause in the instruction directing the jury to include in their verdict expenditures which might be necessary for plaintiff to incur in the future.

4. ———: ———: ———: **Possibly Might.** An instruction which tells the jury that they may allow plaintiff for any reasonable and necessary expenses for medical attention which she may incur in the future, does not mean that the jury may allow her for any expenses she "might possibly" incur.
5. ———: ———: ———: **Matter for Jury.** No positive evidence or opinion can be given as to what medical attention a plaintiff, whose injuries are permanent and consist of paralysis from the hips down, will require. The most that can be done in such a case is to show that the character of the injuries are such that plaintiff will probably need medical attention in the future, and then tell the jury that they may allow such sum therefor as the evidence shows would be just and reasonable. The jurors are as capable of fixing a proper award for such contemplated expenses as anyone.
6. **EVIDENCE: Impeachment.** Evidence which is admissible for any purpose cannot be excluded because it is inadmissible for other purposes. Evidence for plaintiff, in rebuttal, that a physician at the hospital (who was in the employ of defendant) pulled her up and down the hall in an effort to make her walk until one of the Sisters told him to take her to bed where she belonged, is incompetent as hearsay and as tending to prove no issue in the negligence case, but it is competent for impeaching the physician who had testified that no one stopped him from trying to make plaintiff walk. If the defendant desired to have it limited to the purposes for which it was competent, it is its duty to ask an instruction so limiting it.
7. **EXCESSIVE VERDICT: \$10,000.** Plaintiff, as a result of her injuries, is paralyzed from her hips down, her limbs are becoming atrophied, her bowels refuse to perform their normal functions in the natural way, nor from sensation can she tell when she should look after them in that regard; she is sleepless, nervous, and suffers from headache, and her condition is growing worse. *Held*, that it cannot be seen how, if the jury believed her evidence to this effect, their verdict for \$10,000 could have been less.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Boyle & Priest, Edward T. Miller and T. E. Francis for appellant.

(1) Instruction number 3, on the measure of damages, given on behalf of plaintiff is erroneous, because: (a) It assumed that plaintiff lost wages as a result of her injuries. *Plummer v. City of Milan*, 70 Mo. App. 598; *Evans v. Joplin*, 76 Mo. App. 22; *Fullerton v. Fordyce*, 121 Mo. 13; *Freeman v. Railroad*, 95 Mo. App. 104. (b) It permitted plaintiff to recover for medical expenses incurred, when the petition alleged that they had been paid. *Muth v. Railroad*, 87 Mo. App. 422; *Stanley v. Railroad*, 112 Mo. App. 601; *Nelson v. Railroad*, 113 Mo. App. 659. *Curtis v. McNair*, 173 Mo. 291, is distinguishable from the case at bar and those above cited. (c) It allowed a recovery for future medical expenditures, in the absence of testimony that such expenditures would be necessary or what their probable amount would be. 6 *Thompson's Commentaries on Negligence*, sec. 7333; *Railroad v. Flood (Tex.)*, 70 S. W. 331; *Duke v. Railroad*, 99 Mo. 351; *Smith v. Railroad*, 108 Mo. 243; *Morris v. Railroad*, 144 Mo. 500; *Robertson v. Railroad*, 152 Mo. 390; *Slaughter v. Railroad*, 116 Mo. 275. (d) It allowed a recovery for future medical expenses which "probably might" be sustained by plaintiff, instead of limiting the recovery to such expenses as the evidence showed it was reasonably certain plaintiff would be compelled to sustain. *Albin v. Railroad*, 103 Mo. App. 308; *Schwend v. Railroad*, 105 Mo. App. 534; *Walker v. Railroad*, 106 Mo. App. 321; *Bradley v. Railroad*, 138 Mo. 301. (2) The court committed prejudicial error against defendant by permitting plaintiff to testify that a Sister in the hospital had told the doctors, who were assisting plaintiff to walk, "to take her where she belonged." (a) It was inadmissible to prove any issue in the case, because, at best, it was merely a statement of the opinion expressed by the Sister. *Spencer v. Rail-*

road, 120 Mo. 154; Koenig v. Railroad, 173 Mo. 720; Allen v. Railroad, 182 Mo. 437. (b) It was inadmissible to prove any issue in the case because it was hearsay. (c) It was inadmissible to impeach the evidence of Dr. Grim because the proper predicate for its introduction as impeaching evidence was not laid. Gregory v. Chouteau, 36 Mo. 159; State v. Grant, 79 Mo. 132; Spohn v. Railroad, 116 Mo. 629. (3) The court committed prejudicial error in commenting on the testimony of Thomas Lacey, by stating that "the jury will determine what weight is to be given this testimony—whether any, or how much, and all that." 21 Enc. Pl. & Pr., 95, 994; Shakeman v. Potter, 98 Ia. 66; 1 Blashfield, Inst. to Juries, sec. 106; Davidson v. Wallingsford, 88 Tex. 619; Thompson on Charg. Jury, p. 58; State v. Cushing, 29 Mo. 215; State v. Stout, 31 Mo. 406; State v. Meagher, 49 Mo. App. 589; Schmidt v. Railroad, 149 Mo. 283. (4) The verdict is grossly excessive.

McShane & Goodwin for respondent.

(1) A careful reading of instruction 3 will show that the court did not assume that plaintiff lost wages as a result of her injuries. (2) A trial court may, with entire propriety by instructions to the jury, assume the affirmative of an issue of fact, which is established by the uncontradicted evidence. Fullerton v. Fordyce, 121 Mo. 1; Hall v. Railroad, 74 Mo. 298; Barr v. Armstrong, 56 Mo. 589; Caldwell v. Stevens, 57 Mo. 595; Robertson v. Drain, 100 Mo. 273; Hartman v. Muehlbach, 64 Mo. App. 565; Taylor v. Iron Co., 133 Mo. 348. (3) Appellant's point that instruction 3 erroneously allowed a recovery for medical expenses when the petition alleged they had been paid: (a) Having waived any objection to the admission of the testimony and allowed liabilities to be shown as expen-

ditures, it is too late after verdict to complain of an instruction bottomed on that theory. *Spengler v. Railroad*, 108 Mo. App. 329; *Bragg v. Railroad*, 192 Mo. 331. (b) Appellant can not complain on appeal that instructions were based on the evidence and not on the pleadings in a case as shown on this record. *Bragg v. Railroad*, 192 Mo. 331. (c) In a case of this kind there is no difference between expenses incurred and expenses paid. *Curtis v. McNair*, 173 Mo. 270; *Mirrieles v. Railroad*, 163 Mo. 470; *Gorham v. Railroad*, 113 Mo. 408. (d) Respondent was entitled to recover for expenses incurred. *Mirrieles v. Railroad*, 163 Mo. 470. (4) Appellant's point, that said instruction permitted a recovery for future medical expenses, in the absence of testimony showing a reasonable probability of the necessity of such expenses, and the probable amount thereof, is not warranted by the record. (a) Where the injuries of the plaintiff are shown to be the same from the day of the accident to the day of the trial; that nowhere has there been any change in her condition, except for the worse, and the evidence shows that her condition will remain the same throughout life; and the period of nearly one year having elapsed between the accident and the trial, the reasonable value of plaintiff's medical expenses during that time is a sufficient standard by which to measure future medical expenses, where it is shown that her condition will be the same as it has been, throughout life, and especially so is this true when no charge has been made for the temporary and immediate expenses just immediately after the accident. This is the same measure adopted in estimating future loss of earnings. 1 *Joyce, Damages*, secs. 229-230; *Goodhart v. Railroad*, 177 Pa. St. 1. (b) Where plaintiff has shown that she is entitled to nominal damages, the court cannot instruct a verdict for defendant. *Owen v. O'Reilly*, 20 Mo. 603; *Goldman v. Wolff*, 6 Mo. App. 490; *Brevard v. Wimberly*, 89 Mo.

App. 331. (c) And under such circumstances where an instruction is given authorizing a recovery, it will not be held bad where no specific objection pointing out the defect was made. *Feeney v. Railroad*, 116 N. Y. 381. (d) The cause must be tried on the same theory in the appellate court as it was in the lower court. *Bragg v. Railroad*, 192 Mo. 331. (e) Where an instruction is good as far as it goes, and defendant desires to restrict plaintiff's right to recover to more limited grounds than were covered by the instruction, defendant should ask an instruction to that effect, otherwise it waives error that may be caused thereby. *Longan v. Weltmer*, 180 Mo. 322; *Wheeler v. Bowles*, 163 Mo. 398; *Harmon v. Donohoe*, 153 Mo. 263; *Robertson v. Railroad*, 152 Mo. 382; *Mathews v. Railroad*, 142 Mo. 645; *Browning v. Railroad*, 124 Mo. 55; *Parman v. City*, 105 Mo. App. 691; *Dunn v. Railroad*, 81 Mo. App. 42. (5) The verdict is not excessive. (a) Verdicts for the same and greater amounts where the injury was not as serious as here have been sustained. *Cambron v. Railroad*, 165 Mo. 543; *Cobb v. Railroad*, 149 Mo. 609; *Hollenbeck v. Railroad*, 141 Mo. 99; *Barr v. City*, 121 Mo. 23; *Waldheim v. Railroad*, 87 Mo. 37. (b) The trial court was in a better position than this court to determine this matter. In the absence of most obvious error or mistake the judgment of that court should not be disturbed. *Bolton v. Railroad*, 172 Mo. 92. (c) A verdict supported by substantial evidence will not be vacated on the ground that it was excessive unless it is the manifest result of mistake or prejudice. *Taussig v. Schields*, 26 Mo. App. 318. (6) On the record the judgment was for the right party and in the absence of error affecting the merits, it should not be reversed. *Bellismie v. McCoy*, 1 Mo. 318; *Mitchell v. Bradstreet Co.*, 116 Mo. 226; *Jordans v. Eans*, 97 Mo. 587; *Valle v. Picton*, 91 Mo. 207; *Railroad v. Holladay*, 131 Mo. 440; *Com. Co. v. Block*, 130 Mo. 668; *Brandon*

v. Carter, 119 Mo. 572; Herman v. Hartman, 189 Mo. 20.

FOX, P. J.—This action was instituted in the circuit court of the city of St. Louis on May 15, 1903, by plaintiff against the defendant, asking \$20,000 damages for personal injuries received through the alleged negligence of defendant, by prematurely starting a car, while she was in the act of alighting therefrom, at Broadway and Washington avenue in said city.

The allegations of the petition, in so far as they are material in this case, are as follows: That she was a passenger on a north-bound Broadway car; that when it reached Washington avenue, it stopped for the purpose of taking on and discharging passengers; that while so stopped she started to alight from the same and that while so doing defendant negligently and carelessly started said car, thereby throwing her to the ground with great force and violence, and that by reason thereof her spine was violently wrenched, broken and sprained, and that by reason thereof she was paralyzed in her lower limbs and rendered utterly unable to stand or walk without support; that she also received severe cuts and bruises on her back and head which caused concussion of the brain, and that by reason of said injuries she is a complete nervous wreck, and will suffer and remain a paralytic and nervous wreck for life. That on account of said injuries she has been and will be throughout life unable to pursue her usual occupation and that she has expended and will throughout life be compelled to expend large sums of money for hospital fees, nurses, doctor bills, medicine, and transportation fees, such as carriage hire and attendants in going from one place to another.

The answer was a general denial and a plea of contributory negligence and carelessness on her part in attempting to alight from the car while in motion, at a

time and place when and where it had not stopped or slowed down for the purpose of allowing passengers to alight therefrom, and while said car was running at a rate of speed that made it dangerous for her to alight from same.

The reply was a general denial of the new matter stated in the answer.

The plaintiff introduced evidence tending to prove that on the evening of March 8, 1903, about 9:30 p. m., she and her sister, at Broadway and Gratiot street, became passengers on one of defendant's north-bound cars, on the Broadway line; that the car was crowded with passengers, some standing in the aisle, some on the platform and at least one on one of the rear steps of the car; that it was customary for passengers to enter and leave that class of cars at both front and rear doors; that plaintiff and her sister were riding near the front end of the car; that after entering the car it proceeded northward toward Washington avenue, an intersecting street, and that just before reaching the intersection, the motorman, who was on the front platform, said to the passengers in that end of the car, "Please step out this way;" that the car ran a little further and stopped at the northeast corner of Broadway and Washington avenue, for the purpose of receiving and discharging passengers, which was one of the usual places for that purpose; that several passengers entered and left the car at that point, at both front and rear doors; that plaintiff's sister and some five or six other passengers preceded her and that just in front of plaintiff there was an old gentleman who moved slowly and was also alighting from the car; that he, the sister and the other five or six passengers mentioned, safely alighted from the front end of the car; that the old gentleman obstructed the passage of plaintiff and impeded her egress from the car; that she followed immediately after him to the platform and onto the

step of the car; he stepped off and she immediately attempted to follow him and while in the act of stepping from the step of the car to the pavement, the car was suddenly started forward with a jerk and without warning and thereby threw her to the street with great force and violence, she striking the pavement upon her back and head; that the car stopped a second time in a few feet; that she was rendered unconscious by the fall, and was picked up from the street by a passenger by the name of Daush and pulled to the sidewalk near the northeast corner of those two streets; that she was unconscious and was unable to stand or walk, and said Daush and her sister picked her up and took her to a drug store on the corner of Broadway and Lucas, a block distance from the point of injury, and she was shaking like a leaf and appeared to be unconscious. An ambulance was sent for and she was carried to and placed in it and sent to the city hospital, where she remained that night; and next morning she was taken in a carriage to Mrs. Cavender's residence, the lady for whom she and her sister were employed at the time of the injury, where she remained one week and was then taken to St. John's hospital, where she remained four weeks and from there she was taken to her brother's home and later to that of her mother at Washington, Missouri; that her injuries consisted of a large bruise on the head, bruises and cuts on different portions of the body and a strained or fractured spine and a rupture of the spinal cord; that as a result of said injuries she suffered great physical pain and mental anguish, and was still suffering at the time of the trial; that she has been wholly incapacitated from performing manual labor; that she has been completely paralyzed from the hips down ever since the injury, and had not from that time to the time of the trial stood on her feet or walked a step, and that she would never be able to do so in the future, but was growing and would continue

to grow worse; that her lower limbs were becoming atrophied and would continue to do so; that she is and has been ever since the injury very nervous and sleepless and suffering more or less with headache; that the lower bowels are paralyzed and she cannot, in the natural way, answer to the calls of nature, nor from sensation tell when she should look after herself in that regard, but is compelled to depend upon a clock for that information, and at stated times cause a passage, by the assistance of physical means; that she is utterly helpless and cannot go from one place to another unassisted, and that her injuries are permanent; that at the time of the injury she was receiving the sum of twelve dollars per month for her services, together with board and lodging; and had incurred on account of her injuries the sum of \$75 for doctor bills, medicines and nurses, etc.; that she was a strong and a perfectly well woman before the injury.

Then the defendant introduced evidence tending to prove that the car in question stopped on the north side of Washington avenue, that while standing there passengers entered and departed from the car, and then it started on north, and when near the center of the block the plaintiff stepped forward and walked off the front end of the car, some of the witnesses stating that she stepped off backwards; that the car was running five or six miles an hour at the time, and the place where she stepped off was not at a usual or safe place for passengers to alight. That while plaintiff was at the St. John's hospital she, with slight assistance of a physician, walked the full length of the hall and back, the hall being half a block long, and that she remained there about four weeks and was improving rapidly when she left there; that she was not paralyzed, but was suffering from what is known as hysterical paralysis, from which she would fully recover in a short time.

During the cross-examination of Thomas Lacey, a witness for defendant, the following occurred:

"Q. Mr. Lacey, are you positive you gave the conductor, that was on the stand, your name? A. I wouldn't say that was the conductor.

"Q. Is this the woman (indicating) you saw that was injured that got off the car then? A. I can't recognize her

"Mr. Goodwin: Now, your Honor, I want to move that every bit of this testimony of this witness with reference to this accident happening at Washington avenue and Broadway be stricken out.

"The Court: You want the court to try your case, and I can't do that. The jury will determine what weight is to be given to this testimony—whether any or how much, and all that.

"Judge Talty: I object to the remarks of the court.

"The Court: It is not for the court to say whether it applies to this case, to this accident or some other accident; the jury must determine that.

"Mr. Goodwin: Well, I want to say that this—

"The Court: It is useless to discuss it now. You will discuss that to the jury."

The court then, at the request of plaintiff, gave three instructions and one of its own motion, in behalf of plaintiff, to the giving of all of which defendant duly excepted; but as no complaint is urged against any of them, except the one numbered three, the others will not be noticed further. Number three is as follows:

"3. The court instructs the jury that if you find for the plaintiff you should allow her damages at such a sum not exceeding \$20,000 as you believe from the evidence will be a fair and reasonable compensation to her; first, for whatever pain of body and mind she has suffered by reason of her said injuries, and that she

will hereafter suffer, if you find from the evidence she has suffered or will suffer any; second, for the loss of wages heretofore occasioned by said injuries and shown by the evidence, and any loss of her earnings you may find from the evidence, if any, she will hereafter suffer by reason of said injuries; and, third, for any reasonable and necessary expense that you may find from the evidence she has or may hereafter incur for medical treatment on account of her said injuries."

And at the request of the defendant the court gave on its behalf eleven instructions, and refused one as asked, but modified it and gave it in the modified form, to which action of the court in modifying and giving that one it duly excepted, but makes no complaint in that regard here, so we will take no notice of it.

The court on its own motion instructed the jury as to the burden of proof and as to a three-fourths verdict.

The cause was submitted to the jury under the instructions and they found for plaintiff and assessed her damages at the sum of \$10,000. Motions for new trial and in arrest were duly filed. Defendant also filed an affidavit in support of the motion for new trial, alleging prejudice of one of the jurors; and plaintiff filed three counter affidavits. The court overruled both motions and defendant duly excepted and has brought the case here by appeal, and assigns errors as follows:

1. The court erred in giving plaintiff's instruction numbered 3 on the measure of damages.

2. The court erred in admitting incompetent evidence.

3. The court erred in making prejudicial comments on the testimony of defendant's witness, Thomas Lacey.

4. The court erred in refusing to set aside the verdict as being excessive.

OPINION.

I.

The first complaint lodged against the action of the trial court is in giving instruction numbered 3, which is copied in the accompanying statement. Defendant points out four specific objections to it; because, first, it assumes plaintiff lost wages as a result of her injuries; second, it permitted plaintiff to recover for medical expenses incurred when the petition alleged that they had been paid; third, it allowed a recovery for future medical expenditures, in the absence of testimony that such expenditures would be necessary or what their probable amount would be; and fourth, it allowed a recovery for future medical expenses which "probably might" be sustained by plaintiff, instead of limiting the recovery to such expenses as the evidence showed it was reasonably certain plaintiff would be compelled to expend. We will dispose of these assignments in the order presented.

Defendant contends that the instruction assumed she lost wages as a result of her injuries. The uncontradicted evidence of the plaintiff, her sister and the lady who employed her was to the effect that she was earning twelve dollars a month at the time of her injury, and there is not a particle of evidence in the case tending in the remotest degree to show she has been able to perform any labor or earn any wages since that time, and all her evidence tended to show she has been totally unable to work since she was injured. This court has many times held that the trial court may in its instructions to the jury assume the truth of a proposition which is established by the undisputed evidence in the case. [Hall v. Railroad, 74 Mo. l. c. 302; Barr v. Armstrong, 56 Mo. l. c. 589; Fullerton v. Fordyce, 121 Mo. l. c. 13; Taylor v. Iron Co., 133 Mo. 349.]

There was no controversy whatever in this case as

to what wages plaintiff was earning at the time of the accident or that her services were not reasonably worth twelve dollars per month. The facts before the jury were sufficient to submit that issue to it. We are, therefore, of the opinion that there is no merit in that objection. [Wise v. Railroad, 198 Mo. l. c. 561-2.]

It is next contended that said instruction is erroneous because it permitted the plaintiff to recover for medical expenses incurred, when the plaintiff alleges that they had been paid. It is the debt incurred and not its payment which establishes the liability of the defendant to pay for medical expenses necessarily expended by plaintiff, in personal injury cases. It is wholly immaterial whether they have been paid for by plaintiff or not. It was neither necessary to allege or prove payment. That could in no wise affect defendant's liability for debts so incurred. The petition states "that she has expended and *will be required to expend* large sums of money for hospital fees, nurses, doctor bills and medicines." The evidence shows she not only incurred obligations for those things, but it also shows she has paid for some of them and will be required to contract additional indebtedness for that account in the future. It was wholly unnecessary to allege payment of those expenses. A complete cause of action was stated without that allegation, and it may be treated as surplusage. [Anderson v. Railroad, 161 Mo. l. c. 432; State v. Watson, 141 Mo. l. c. 341.]

"A pleader only runs the risk of narrowing the basis of his case when he goes beyond the necessary and substantive fact and indicates" that the indebtedness incurred had been paid, and says nothing about future expenses, which will necessarily have to be incurred. [Wise v. Railroad, 85 Mo. l. c. 188.]

In this case, however, it will be observed by reading the petition that the pleader did not rest with the allegation that the expenses had been paid, but went

further and alleged that it would be necessary to incur obligations for future medical treatment. The latter allegation removes from the case even the technical rule of pleading as stated in the two cases last cited. [Curtis v. McNair, 173 Mo. 270.] We are, therefore, of the opinion that there is no merit in this objection.

The third objection lodged against this instruction is that it permits the jury to include in its verdict expenditures which might be necessary for plaintiff to incur in the future, on account of her injuries, when there was no evidence to show that they would be necessary, or what they would be reasonably worth. We are also of the opinion that this objection is without merit, because at the trial the evidence showed that plaintiff had three physicians and one or two of them testified that she was then still under their charge and was a helpless, a suffering paralytic, and would never improve, but would continually grow worse. If that condition of her health does not tend to show she will need medical attention in the future, we are unable to conceive a case where such attention would be necessary. As to what attention she will require during her life and its probable value are matters of more or less speculation. No one can tell how long she will live, what her suffering will be or what amount of medical attention she will require. The jurors are as capable of judging of those matters as any one else could be. [See Curtis v. McNair, 173 Mo. 270.]

And the last objection urged against instruction numbered 3 is that it permitted the jury to allow for medical expenses which "probably might" be sustained by plaintiff, instead of limiting the recovery to such expenses as the *evidence shows it was reasonably certain* the plaintiff would be compelled to expend. We have carefully considered that instruction and have reached the conclusion that it is not susceptible of the construction placed upon it by defendant. It does not

tell the jury that they may allow her for medical expenses which "probably might" be incurred by her; but, upon the contrary, it tells the jury, in express terms, that they may allow her for any *reasonable and necessary expenses* for medical attention which she may incur in the future. And what we have said regarding the last objection is equally applicable to this one; but we will add that we are entirely unable to see how any witness could, with any degree of certainty, testify as to what *medical attention* she might require during the remainder of her life. No physician or expert can tell how long plaintiff will live; what her pain and suffering will be, if any; what kind and how often she will need medical treatment nor what such services would be reasonably worth in the future. The most the court can do in such cases is to call the attention of the jury to the injury, if permanent, and if the evidence shows that the character of the injuries is such that the party will probably need medical attention in the future, then tell them that they may allow such sum therefor as the evidence and facts in the case show would be just and reasonable for such attention and services. We do not wish to be understood as stating or holding that, in injuries of a temporary nature, where the patient will shortly recover, it would be impossible to ascertain with some degree of certainty as to what future medical treatment such a person would require, or the reasonable value thereof. We are of the opinion that the instruction given fairly presented the law upon that question to the jury, and are, therefore, of the opinion that there was no error on the part of the court in giving it.

II.

It is next contended that the court committed prejudicial error in permitting the plaintiff in rebuttal to testify that a Sister in the hospital had told the doctors

who were assisting the plaintiff to walk, to "take her where she belonged." This assignment couched in the language in which it is does not fully and clearly present the exact ruling of the court on the admissibility of the evidence referred to. In order to obtain a clear view of the court's ruling it will be necessary to set out Dr. Grim's testimony upon that point, and in the light of that evidence we can better see the ruling of the court on the admission of the plaintiff's said testimony in rebuttal, which is as follows, in chief:

"Q. Do you know why she left [the hospital]? What was her condition when she left? A. Well, when she left she had been able to walk with some assistance, the full length of the hall of St. John's Hospital and back.

"Q. How long is that hall. A. Half a block.

"Q. The hall is half a block in St. John's Hospital? A. Yes, sir.

"Q. You say she had been able to walk with some assistance the full length of that hall and back? A. Yes, sir.

"Q. How do you know that? A. Because I helped her myself.

"Q. How much assistance did you give her? A. Well, a part of the time I just reached out my hand, holding her fingers at arm's length, and I, of course, tried to get her to walk with as little assistance as possible. I would allow my hand to move as she would attempt to bear weight on it."

On cross-examination:

"Q. The nurses are Sisters of Charity there, are they not? A. Not all of them.

"Q. Some of them are? A. Yes, sir.

"Q. Now, isn't it a fact that you started to teach or try to get this patient to walk and dragged her around there and two of the nurses interfered and told

you if you didn't quit it you would kill the woman. A. No, sir.

"Q. Isn't it a fact that two of the nurses stopped you from trying to make her walk? A. No, sir; that is very far from a nurse's position.

"Q. Isn't it a fact that somebody stopped you from making her walk? A. No, sir.

"Q. Or trying to make her walk? A. No, sir."

The plaintiff was called as a witness in rebuttal and testified over defendant's objections, as follows:

"Q. Did you hear Dr. Grim testify that you walked with his assistance out at the hospital? A. Yes, sir, I did.

"Q. Is that true or not? A. No, sir.

"Q. State what happened? A. They dragged me up and down the hall, the nurse and the doctor did, and the Sister in the hospital by the name of Catherine told them to bring me to bed where I belonged."

"Judge Talty, for defendant: I object to that and ask that it be stricken out.

"The Court: That last statement as to what the nurse stated is stricken out.

"Mr. Goodwin, for plaintiff: I asked the doctor that very question—the time, place and everything, and he stated that it didn't occur. That very thing I asked him.

"The Court: Yes, since you call my attention to it, that may stand. The objection is overruled."

The action of the court in admitting this evidence of the plaintiff in rebuttal is assailed upon three distinct grounds, because, first, it does not tend to prove any issue in the case, and, at best, was merely the statement of the opinion expressed by the Sister; second, it is hearsay, and, third, it was inadmissible to impeach Dr. Grim, because the proper predicate for its introduction was not laid. We will dispose of the first and second assignments together. It is true the evidence

objected to does not tend to prove any issue in the case and even if it did it is clearly hearsay, merely stating the opinion of the Sister as to the condition of plaintiff at the time Dr. Grim was assisting her to walk. It was therefore inadmissible upon both of said grounds. This is not controverted by plaintiff, and the rule of evidence is so well and firmly settled upon those questions that it would be a useless waste of time and energy to cite authorities in support thereof. But we do not understand that this evidence was offered or admitted for either of said purposes. The language of the court and of plaintiff's counsel, when the motion to strike out this evidence was made, showed clearly that it was offered and admitted merely for the purpose of impeaching Dr. Grim's testimony. He had previously testified that while plaintiff was in St. John's Hospital he was one of the assistant physicians of that institution (in pay, however, of defendant company), and that with his slight assistance she had walked the whole length of the hall and returned, and in order to show that statement of his to be false, and for the purpose of impeaching him, the questions were asked him, if he did not, in the presence of plaintiff and one of the nurses, pull or drag her from one end of the hall to the other, and that the nurse at the time protested. He had himself previously stated the time, place and circumstances, where the supposed conversation took place, and for that reason it was not necessary to go through the empty form to have him repeat his former evidence upon that question. He denied dragging plaintiff and testified that the Sister did not protest against his doing so, and when the motion was made by defendant's counsel to strike out that evidence the court did so, but subsequently, after having its attention called to the fact that the proper foundation had been laid to impeach the doctor, the court said: "Yes, since you call my attention to it, that may stand. The objection is overruled." This shows clear-

ly that the evidence was admitted only for the purpose of impeaching Dr. Grim, and not for the purpose of proving an affirmative substantive fact in the case. Evidence which is admissible for any purpose cannot be excluded simply because it is inadmissible for other purposes. [Union Savings Asso. v. Edwards, 47 Mo. l. c. 449; State v. Baldwin, 56 Mo. App. l. c. 426; Standard Milling Co. v. Railroad, 122 Mo. 258.]

Where the evidence is competent for any purpose, it is the duty of the court to admit it when offered, and if it is desired to have it limited in its effect then it is the duty of the opposite party to ask an instruction for that purpose. [Standard Milling Co. v. Railroad, 122 Mo. 258.] But the defendant in this case suffered no injury by failing to ask such an instruction, because the court in admitting the evidence by its language limited the evidence to the impeachment of the evidence of Dr. Grim, as clearly as if it had been done by an instruction. Clearly this evidence was admissible for that one purpose, and there was no error in the action of the court in admitting it.

The defendant complains of the action of the court in stating, while witness Thomas Lacey was testifying, that "the jury will determine what weight is to be given this testimony." We see no merit whatever in this assignment; first, because the ruling of the court was a correct declaration of the law, and there is scarcely a case tried by a jury where such an instruction is not asked by one or both parties, and given by the court, and in this case this language is found in defendant's tenth instruction asked by it and given by the court: ". . . and having thus carefully considered all these matters, the jurors must fix the weight and value of the testimony of each and every witness, and the evidence as a whole, and you are not compelled to accept as true any statement of any witness, unless the jurors

find such statement to be true," etc. The expression of the court was not made as a comment upon the evidence of Lacey, but as a reason why he should not strike out his testimony as requested by defendant's counsel.

Finally, it is insisted by learned counsel for appellant that the verdict in this cause is excessive and for that reason ought not to be permitted to stand. The verdict is for ten thousand dollars, and after reading in detail all of the testimony disclosed by the record, it would be difficult to understand, if the jury believed the testimony introduced by the plaintiff, how the verdict could have been for any less sum. We shall not undertake to weigh the testimony of the witnesses respecting the nature and character of the injuries of the plaintiff. This was exclusively the province of the jury and if they placed reliance upon the proof as introduced by the plaintiff, then we have no hesitation in saying that their verdict is fully supported. The testimony upon this subject as introduced by the plaintiff, which is fully disclosed by the record, not only shows that her injuries were of a very serious and painful character, but as well that the result of such injuries has left her a complete physical wreck, in which condition she must remain the balance of her life. We are unwilling to say that this verdict should be disturbed on that ground.

Our views upon the legal propositions presented by the record before us have been fully indicated, and finding no reversible error the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

**HOUGHTON et al. v. FRANCES PIERCE et al.,
Appellants.****Division Two, May 14, 1907.**

1. **EJECTMENT: Suit Against Landlord Alone.** Even though the plaintiffs in ejectment are shown to be the owners in equity of the land, they cannot recover possession if the suit is brought against the landlord alone and the evidence shows that a tenant who was not joined as a defendant was in possession at the time the suit was brought.
2. ———: **Possession by Trustee: Adverse to Beneficiary: Limitation.** Where a trustee, to whom has been conveyed land for the sole use and benefit of another, enters into possession without other title than that conferred by the trust deed, the presumption is that he took possession as trustee by virtue of the deed, and not adversely to the beneficiary. Thereafter his possession could become adverse to the beneficiary, or after her death to her heirs, only by some unequivocal act or acts brought home to her knowledge, or after her death to their knowledge, showing that he claimed the title in opposition to her or their title, or such an occupancy or user so open, notorious, and inconsistent with their rights that the law will authorize from such acts the presumption of such knowledge by them.
3. ———: ———: **By Trustee's Wife Under Deed of Trust: Mortgagee in Possession.** The owner of the land in 1865 conveyed it in trust for the sole use of the owner's wife, and the trustee at once entered into possession. The trust deed was made subject to a prior deed of trust to secure a note for \$300, which was assigned by the payees by indorsement in blank, and this note was in possession of defendant, the trustee's wife, but the evidence does not show how or when she came into possession of it. The beneficiary of the trust deed died in 1872, and the trustee in 1899, and the trustee's wife claims title as assignee of the note and by adverse possession, but there is no evidence that she claimed possession adversely to her husband. *Held*, first, that possession by her cannot be considered adverse to her husband or to the beneficiary, without the most unequivocal assertion of claim of a separate estate hostile to both and brought home to their knowledge; *second*, as her husband, the trustee, took possession under the trust deed, the presumption is that her acts in receipting for the rents and paying the taxes were done in subordination to his legal title and right of possession, at least up to the time of his death in 1899; and,

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third, assuming (what is not shown) that the trustee's wife took the note indorsed in blank in good faith, for value, before maturity and without notice, and that the indorsement was proved, the presumption is that the rents which the trustee permitted her to receive were so received and applied by her to pay off the note, it being the duty of the trustee to protect the beneficiary's estate and pay off the prior lien out of the rents and profits.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

AFFIRMED.

Harry H. Haeussler for appellants.

(1) The court erred in declaring the law to be that "before the mere production of a note will make prima-facie proof of ownership, the indorsements of the payees must be shown by evidence." *Keim v. Vette*, 167 Mo. 399; *Ashbrook v. Letcher*, 41 Mo. App. 371; *Johnson v. McMurry*, 72 Mo. 282; *Reinhard v. Dorsey Coal Co.*, 25 Mo. 353. (2) The court erred in finding the fact and declaring the law to be "Mrs. Pierce's possession was her husband's possession. He was entitled to possession of her property during coverture." *Hart v. Leete*, 104 Mo. 329; *Clark v. Clark*, 86 Mo. 122; *DeHatre v. DeHatre*, 50 Mo. App. 1.

D. C. Taylor for respondents.

(1) The Statute of Limitations did not run against plaintiffs. *Rodney v. McLaughlin*, 97 Mo. 431; 1 Am. and Eng. Ency. Law, 241, 250, 264. (2) Defendants, by their answer, threw the case on the equity side of the court. *Laws* 1897, p. 74; *Meyers v. Schuchmann*, 182 Mo. 159. (3) There is no sufficient evidence that Frances Pierce is the owner, for a valuable consideration, of the note and deed of trust under which she now pretends to claim as a "mortgagee in possession," and before she would be entitled to claim as such, she must

prove that she is the owner of the note secured by the deed of trust, that it was endorsed to her. *Bank v. Donnell*, 35 Mo. 373; *Bank v. Pennington*, 42 Mo. App. 355; *Hugumin Co. v. Hinds*, 97 Mo. App. 352; *Dunlap v. Kelley*, 105 Mo. App. 4.

GANTT, J.—In September, 1903, the plaintiffs brought their action in ejectment in the circuit court of St. Louis county, for a tract of land situated in said county, described as a tract of land containing twenty and ten one-hundredths acres, in U. S. Survey No. 3116, township 44 north, range 5 east, it being lot No. 32 of a subdivision of said survey, made April 30, 1845, a plat of which subdivision is of record in Plat Book No. 1, vol. 2, page 61, in the office of the recorder of deeds for the city of St. Louis, Missouri. Ouster was laid as on the — day of —, 1898. Judgment was prayed for possession of said premises, with damages to the amount of five hundred dollars, and twenty-five dollars for the monthly rents and profits.

The answer of the defendants, Lucy, Cora and Della Pierce and Frances and Allen Pomroy, was a general denial. The answer of Frances Pierce was first a general denial and secondly a plea of the ten-year Statute of Limitations, and then by way of further defense, she pleaded that she was the owner of the said real estate, and that the plaintiffs have now come and by their petition claim some title or estate in said real estate as above described, and she prayed the court to ascertain, determine and adjudge her title and interest in and to said real estate, and that her title be quieted.

For reply the plaintiffs deny all the new matter therein pleaded.

The cause was tried to the court without a jury.

On the part of the plaintiffs, the evidence was as follows: First, it was admitted that the common source of title is a deed from Felix G. Dunnivant and wife to

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Levi W. Cline, dated July 26, 1864, and recorded in book 310, page 272, of the recorder of deeds of the city of St. Louis, and it is further admitted that a John Pierce was the husband of Fanny Pierce, and that he died January 21, 1899. Plaintiff then introduced and read in evidence a certified copy of a deed from Levi W. Cline to John Pierce, trustee for Jane Elizabeth Cline, dated the 23rd day of December, 1865, recorded in book 310, page 274, of the recorder's office of the city of St. Louis, conveying the following described property situate in Carondelet township, St. Louis county, to-wit: Lot number thirty-two of the subdivision of United States survey No. 3116, on the Meramec river near the Fenton bridge, beginning at a point the common corner of lots 17, 18, 19 and 20, thence south 28 degrees east with line between lot 17 and 20, fifteen and eight one-hundredths chains to corner of lots 16, 17, 20 and 21; thence south 52 degrees west with north line of lots 20, 29 and 32 forty and thirty-four one-hundredths chains to Meramec river; thence up said river to southwest corner fractional lot 30; thence north 52 degrees east twenty-one and ninety-seven one-hundredths chains to the beginning. Containing twenty acres and ten one-hundredths more or less. And a certain lot of personal property consisting of horses, cows, hogs, chickens and household and kitchen furniture on the said premises. "The above-described real estate is hereby conveyed subject to a deed of trust of even date herewith given by said first party to Voullaire and Jordan to secure the payment of a note therein described. To have and to hold the same with all the rights, immunities, privileges and appurtenances thereunto belonging unto the said party of the second part and his heirs and assigns forever. This deed is made to said second party in trust for the sole use and benefit of said Jane Elizabeth Cline, wife of said first party, to be by her held, used and enjoyed together with the rents

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and profits thereof separate and apart from her husband with full power to sell and convey the same or in anywise dispose of the same as she shall request and direct in writing."

William Houghton, one of the plaintiffs, testified that he was forty-six years old, and was the son of Jane E. Cline, who had married Levi W. Cline after the death of his (Houghton's) father; that he never had seen Cline and knew nothing of his death; that later his mother married one James Abner in Edwardsville, Illinois, and by this Abner had two children, Jennie, who died when nine months old, and Sallie, about whom he testified as follows: Q. What became of Sallie? A. Henry Sutter took her to raise and moved to Mt. Pleasant, Texas, and I lost track of her. Q. That is Sallie Abner? A. Yes, sir. Q. What is her name now? A. Sallie Reese. Q. When did you last see her? A. In 1897, nine years ago, and I saw her last month again on the 30th of October, she was here in Clayton then, she and her husband. Q. You recognized her when you saw her? A. Yes, sir. Q. You recognized her and knew her to be a child of your mother? A. Yes, sir, she has her resemblance. My mother died in 1872 in Edwardsville, Illinois, she was a half sister of Mrs. Fanny Pierce, whose husband was John Pierce, the same man to whom this property was transferred in trust for my mother. John Pierce took possession of the said property belonging to my mother. I did not know of any writing in regard to it. I did not return to the place here until in June, during all of which time I lived in Illinois, and had not seen my sister Sallie since she left Edwardsville when a little child, until she came to Clayton. At the time John Pierce took possession he was in the fire department in St. Louis, and lived on Barrett street. He was not a farmer.

On cross-examination he stated that John Pierce took possession of the land after we left in 1866, when

plaintiff was nine years old. We left the place and went to Venice, Illinois, mother and I, and lived there all the time until mother died in Edwardsville. Mother married Abner while I was working for Mr. Mackey, and she sent my step-father to get me. I was living with her when the step-children were born, and when the one died. I do not know how the property was transferred to Pierce, nor how he took possession. Do not think that he went to live on the place. Since we moved from the land I did not go to see it or make any inquiries about it until this year. I visited the Pierces once and was ordered away and never visited them again. He stated that the first time he had seen the property since was in June of the year of the trial. Asked what induced him to come back, he answered, "I went to see — they always claimed that I owed \$600. They never would give me possession until I raised it, and I couldn't do that and I came out here to see if there was anything coming to me, if not, I was satisfied." Fanny Pierce told him that he owed them \$600 when he was a boy fifteen years old; that was when he went to see them and she told him not to darken her door any more. He saw Mr. Pierce, but the latter never talked to him on the subject. John Pierce took possession of what we left, the land and the personal property. He came out there and took the stock, I saw him riding the horses in; one of the horses belonged to plaintiff's mother.

William Stafford testified that he had lived in the county except for an interval of two years, since 1865. He knew Levi W. and Jane Elizabeth Cline, who lived on the land in dispute. He knew John Pierce who was a brother-in-law of Jane Cline and had seen him on the place. He saw the plaintiff several times and recognized him as the boy who claimed to be the son of Mrs. Cline. He further testified, he knew old man Cline, because about 1864, witness prosecuted him for horse

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stealing, and he was convicted and sent to the penitentiary; after this in 1865, witness went west and lost track of the Clines; they were gone when he got back two years later. He had promised to look up this property for plaintiff Houghton, and he promised to pay him something. Witness went security for costs for him in this case. Witness did not know Sallie Reese, nor anything about the transfer from Cline to Pierce. There had been several tenants on the property. Witness's brother-in-law rented it at the time witness came back from the west. Witness's mother died in the house on the place. The property was always spoken of to me as "The old Cline place." Houghton, the plaintiff, had told witness six or eight years ago, that he thought he had rights there, but the Pierces said they would deliver the property to him if he would pay them six hundred dollars, or seven hundred dollars, and that was the reason he supposed that the Pierces had possession of the property. The marriage license issued to James D. Reese and Sallie Abner, dated the 12th of November, 1891, was offered in evidence.

Edward Weidlich and Julius Weidlich testified that their father rented the land for sixteen years, and after him Julius Weidlich rented it. They paid the rent to Mrs. Pierce, Mr. Pierce himself never saying anything about it. Sometimes the receipts for the rent were signed by the daughters of Mrs. Pierce. For the past six years the land had been rented to one Longhibler. It was worth about fifty dollars per year rent. The receipts for rent were offered in evidence; one reads as follows:

"Received, St. Louis, January 8, '81, from Edward Weidlich twenty-five dollars on account of rent for Elizabeth Cline's place in St. Louis county. John Pierce, By William Downing, Agent."

Another receipt reads:

sum of twenty-five dollars, the same being the rent for farm known as the Jane Elizabeth Cline place, beginning March 1, and ending September 1, '82. Mrs. John B. Pierce."

The other receipts are practically in the same form and included the time until March, 1886. This was substantially the evidence for the plaintiffs.

Defendant then introduced and read in evidence a deed of trust executed by Levi W. Cline and Jane Elizabeth Cline to Leicester Babcock as trustee, for Seymour Voullaire and Lewis S. Jordan, dated and acknowledged December 23, 1865, and recorded December 23, 1865, in the recorder's office of St. Louis county in book 310, page 273, conveying the property in dispute in trust for the following purposes: "Whereas, Levi W. Cline is justly indebted unto said parties in the third part in the sum of three hundred dollars, and to secure the payment of said sum, has this day executed his negotiable promissory note for said sum of three hundred dollars bearing even date with this deed and payable three months after date thereof to the order of said parties of the third part, at the Bank of the State of Missouri, and bearing interest at the rate of ten per cent per annum from maturity." Defendant also introduced in evidence a note with indorsements in words and figures as follows:

"\$300.00.

St. Louis, December 23, 1865.

This note secured by deed of trust.

Three months after date, I promise to pay to the order of Seymour Voullaire and Lewis S. Jordan three hundred dollars, for value received, negotiable and payable without defalcation or discount, with interest at the rate of ten per cent per annum from maturity, at the Bank of the State of Missouri.

"LEVI W. CLINE."

Endorsements: "Without recourse on me in any event. Seymour Voullaire" and: "Without recourse on me in any event. Lewis S. Jordan."

To the introduction of this deed of trust and note, the plaintiffs objected on the ground that it was incompetent and irrelevant to show title in Mrs. Pierce. It does not appear that the deed of trust has ever been foreclosed. She may be the legal holder of that note for value, but that would not give her any title or even color of title. Which objection was overruled and exception saved.

Henry Longhibler, witness for defendant, testified that he and his wife had gone to town and rented the place in the name of Mrs. Longhibler; that they dealt entirely with Mrs. Fanny Pierce, that he never saw John Pierce. My wife always went into town after that to pay the rent. I still rent the place and pay fifty dollars per year for it. There is no building on the land, and Mrs. Pierce never lived on it.

Mrs. Longhibler testified that all the transactions were had with Mrs. Pierce and they never spoke to Mr. Pierce. She had lived in that section all her life and never saw John Pierce on the place or near there. I remember Mrs. Cline very well, the last time I saw her was in the sixties. Mrs. Pierce leased the land to us for five years with the privilege to buy.

Peter Weber, who resided near the land for twenty-three years, testified that he was at one time road overseer for the district, and went to see Mrs. Pierce on account of the road about eleven years ago, under the instructions of the court to see the owners of the land. He spoke to Mrs. Pierce who said she would be satisfied if she got the value of the land.

Lucy Pierce testified she was a daughter of Fannie and John Pierce. Her father died January 21, 1899, for many years she had charge of the land for her

mother. Her father was never present when the rent was paid. The tenants did not pay their rent. Mr. Stafford's relatives rented and left without paying. In 1880, the Weidlichs took possession and paid their rent when they could pay, part in fruit and vegetables. In 1898, the Longhiblers took possession and are the present tenants. The receipts produced were written or signed by her sister or herself, only one being signed by William Downing, who acted as agent to compel the first tenants to pay their rent. William Houghton, the plaintiff, came to see us in 1871, when he told us his mother was dead. My mother sheltered him and gave him clothes, and he took me to a circus. I have not seen him since until this spring, when he told me my father said he could have the land by paying three hundred dollars that my mother had advanced to him. My mother has been in very poor health for four or five years. We paid the taxes on the property by sending the money by mail to the collector and received the receipts. Did not know there was such a person as Sallie Reese until this spring, when Will Houghton told me he had a half sister, but did not know her name. I do not remember having ever seen Mrs. Cline. I never heard my father say he was trustee of the property, but he always said the money belonged to mother. Mrs. Cline was mother's half sister.

At the close of the evidence the court gave the following declarations of law:

"The court instructs the jury that if they believe from the evidence that the defendant was in the actual, open, notorious and continued adverse possession of the land in controversy for at least ten years before the institution of this suit, claiming to be the owner thereof, then they will find their verdict for the defendant.

"The court instructs the jury that the possession of a tenant is not such a possession of the landlord as will enable a plaintiff in ejectment to recover against

such landlord as a sole defendant, and if the court finds from the evidence in this case that at the time of the institution of this suit, defendant had a tenant in actual possession of the premises and that he, the defendant, was not in the actual possession of the premises, the judgment should be for the defendant."

The court then refused the following declarations of law requested by the defendant:

"The court instructs the jury that a beneficiary in a deed of trust in possession, who for the period of limitation refuses to recognize the existence of the deed of trust or any claim of the maker thereof, may stand upon such adverse claim and invoke the Statute of Limitations against the maker of said deed or any person claiming under him, and, if they believe from the evidence that the defendant, Fannie Pierce, was in possession, as beneficiary in the deed of trust made and executed by Levi W. Cline and Jane E. Cline, his wife, for a period of more than ten years, refusing to recognize the existence of such deed of trust, or any claim of the makers thereof, or any person claiming under them, then they will find their verdict for defendant Fannie Pierce.

"The court instructs the jury that a beneficiary in a deed of trust or his assignee in possession of land under the deed of trust, which has become forfeited by the default of the debtor and maker of the deed, may protect his possession by virtue of his title under the deed of trust, and if the jury believe from the evidence that the defendant herein, Fannie Pierce, the assignee of the beneficiary in the deed of trust given by Levi W. Cline and his wife, Jane Elizabeth Cline, is in possession of the land under said deed of trust which has become forfeited by default of the debtor, then they will find for the defendant, Fannie Pierce."

To the refusal of the court to give these declarations of law, the defendant duly excepted at the time.

The court found from the evidence that Longhilder was at the commencement of the suit, and still is, in possession of the land sued for as tenant of Mrs. Frances Pierce, and hence plaintiffs cannot recover possession, and the judgment must be for the defendant on the cause of action in ejectment with costs upon that cause of action. On the counter-claim for a decree for title in favor of Mrs. Pierce, the court found for the plaintiff and held that Mrs. Frances Pierce had no title to the property and that plaintiffs have the title to said land as against the defendant Frances Pierce, and awarded costs to the plaintiffs on that branch of the case. From this judgment and decree vesting title in the plaintiffs, the defendant Fanny Pierce appealed to this court.

I. At the threshold of the discussion of the respective propositions advanced by counsel, it may as well be stated that we shall proceed on the basis that the testimony abundantly establishes that the John Pierce mentioned in the oral evidence is the same John Pierce to whom Levi W. Cline and Jane Elizabeth Cline conveyed the land in controversy on December 23, 1865, and that Mrs. Fannie Pierce is one and the same with the Mrs. Frances Pierce mentioned in the evidence. In so doing we are not called upon to rely merely upon the presumption of identity of person from the identity of name. The facts disclosed that the John Pierce to whom the lands were conveyed in trust was the brother-in-law of Mrs. Jane Elizabeth Cline, and that he took possession of the trust estate under the deed, and this same John Pierce was the husband of Mrs. Frances Pierce or Fannie Pierce as she is known throughout the testimony. The attempted distinction between John Pierce, the grantee and trustee in the deed, and John

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Pierce, the husband of Mrs. Fannie Pierce and father of the other defendant, is a mere play upon words. The identity of John Pierce, trustee in the deed, and John Pierce, the husband of Fannie Pierce, was too conclusively established to admit of a doubt, and the circuit court was right in basing his judgment upon that assumption. Starting then with the common source of title, to-wit, Felix G. Dunnivant, it is admitted that Dunnivant and wife by warranty deed conveyed the land in dispute to Levi W. Cline, July 26, 1864, and that Levi W. Cline conveyed the said land to John Pierce on the 23rd of December, 1865, in trust for the sole and separate use and benefit of Jane Elizabeth Cline, with power in said trustee to sell and convey the same or in anywise dispose of the same as said Jane E. Cline should request and direct in writing, which deed was duly recorded in the office of the recorder of deeds of St. Louis, on the same day. Under this deed John Pierce took possession of the land in controversy, and as late as January 8th, 1881, gave a receipt for the rent thereof in the following form:

“Received, St. Louis, January 8, '81, from Edward Weidlich twenty-five dollars on account of rent for Elizabeth Cline's place in St. Louis county.

“JOHN PIERCE,
by WILLIAM DOWNING, Agent.”

The parol evidence tended to show that Levi Cline was convicted and sentenced to the penitentiary. Whether said Cline died, or Mrs. Cline was divorced from him, does not appear from the testimony save by inference from the fact that she afterwards married James Abner and of this last marriage one of the plaintiffs, Sallie Reese, was born. Mrs. Cline died in Edwardsville, Illinois, in 1872, leaving the two plaintiffs, William Houghton and Sallie Reese, her only heirs at law. The record is silent as to whether Abner died or

is still living. There was also testimony that the plaintiff Houghton visited John Pierce in his lifetime in St. Louis, and was told by Mrs. Pierce that he owed them \$600, and possession would not be given him until he paid that amount, and that plaintiff, Houghton, at that time was about fifteen years of age and was not able to pay \$600. There is no evidence in the case that John Pierce ever made any claim of title to the land in suit adverse to the plaintiffs or their mother up to the time of his death in 1899, but the land was rented to various tenants and receipts given for the same in his name and in that of his wife, Mrs. Fannie Pierce. Prior to the execution of the deed conveying the land in trust to John Pierce, and on the same day a deed of trust was executed by Levi W. Cline to Seymour Voullaire and Lewis Jordan for \$300. This deed of trust does not appear to have ever been foreclosed, but the note was introduced in evidence with two endorsements thereon by Voullaire and Jordan without recourse on them. How this note came into the possession of Mrs. Pierce or whether she purchased the same from Voullaire and Jordan or received the same from her husband, John Pierce, does not appear. John Pierce never made any conveyance of the land in his lifetime, nor does it appear that Mrs. Cline or Mrs. Abner ever attempted to convey the same or requested John Pierce to do so in writing. So far then as the legal title appears from this record it was in John Pierce at the time of his death in 1899, in trust for Mrs. Jane Elizabeth Cline, and at the death of said John Pierce, the legal title thereto descended to his children and heirs at law, Lucy, Cora and Della Pierce and Frances and Allen Pomroy, and they disclaim any title whatever in the premises. The evidence further tended to prove that the property has at all times been assessed in the name of Jane Elizabeth Cline, and the taxes have been paid by Mrs. Pierce.

The defendant Mrs. Fannie Pierce asserts title to the land in dispute by virtue of adverse possession.

As the evidence in the case showed that one Longhibler was in the possession of the land at the time of the commencement of the suit, the circuit court very properly adjudged that plaintiffs could not recover possession in ejectment as Longhibler was not made a party to the action, even though they were shown to be the owners thereof in equity.

The controlling question presented on this appeal is, whether Mrs. Fanny Pierce was entitled to a judgment decreeing the title to her under her cross-bill asserting title thereof by virtue of her adverse possession. Inasmuch as John Pierce entered into possession of the property in 1865, without other title than that conferred upon him by the deed conveying the same to him in trust for Mrs. Cline, the presumption is that he took possession thereof as trustee by virtue of said deed and not adversely to Mrs. Cline. Under such circumstances his possession could not become adverse to Mrs. Cline and her heirs without some unequivocal act or acts brought home to the knowledge of Mrs. Cline in her lifetime or her heirs after her death, showing that he claimed title thereto in opposition to her or their title, or such an occupancy and user so open and notorious and inconsistent with their rights that the law will authorize from such facts the presumption of such knowledge by them. [Hunnewell v. Burchett, 152 Mo. 1. c. 614.]

A careful scrutiny of the testimony in this case does not show that John Pierce's possession was ever changed to an adverse holding in repudiation of Mrs. Cline's right. Nor does the defendant, Mrs. Fanny Pierce, apparently make any such claim, but her insistence is, as evidenced by the declarations of law which she requested the court to give, and by the argument of

her counsel in this court, that she took possession of said land in satisfaction of the note and deed of trust given by Levi W. Cline and wife to Voullaire and Jordan to secure the note of Cline to them, of which said note she claims, or rather her counsel does, to be the assignee or indorsee. But Mrs. Pierce did not testify in this cause, and there is no evidence save possession that she is the owner for value of the Voullaire note and deed of trust, nor when, nor how, she came into possession thereof, nor is there any evidence tending to show that she claimed possession of the property adversely to her husband, John Pierce; on the contrary, as the possession was in him, every presumption must be that her acts in receipting for the rents and paying the taxes were done in subordination to his legal title and right of possession, at least up to the time of his death in 1899, and subsequent adverse possession by her would not confer title by the Statute of Limitations. Whatever possession she had prior to his death prima-facie would be her husband's possession, as he was entitled to the possession of her property during coverture; as said by the circuit court, "Possession by the wife of a trustee could not be considered adverse to her husband, or to his *cestui que trust*, without the most unequivocal assertion of claim of a separate estate, hostile to both and brought home to their knowledge." But Mrs. Pierce invokes the rule that the holder of a negotiable note indorsed in blank by the payee is prima-facie the owner of it, and is presumed to have taken it in good faith for value before maturity and without notice, as has been held by this court in *Fitzgerald v. Barker*, 85 Mo. 13; *Mayes v. Robinson*, 93 Mo. l. c. 122; *Horton v. Bayne*, 52 Mo. 531; *Keim v. Vette*, 167 Mo. l. c. 399. A reference to all of those cases will show that the indorsements in each were either admitted or proven. In this case, there was no evidence whatever as to the genuineness of the indorsements of Voullaire and Jordan, the

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payees of the note, but without resting our opinion on the necessity of the proof of the indorsements, we do not think the facts of this case raise a presumption that Mrs. Pierce acquired this note and deed of trust in the due course of business before maturity; on the contrary, we think a much stronger presumption arises that as John Pierce was the trustee of Mrs. Cline, and as such was in possession of her separate real estate, it was his duty to protect her said estate and pay off the prior lien of Voullaire and Jordan out of the rents and profits derived from said estate, and when this note and deed of trust were offered in evidence by his widow the natural and reasonable presumption is that John Pierce, out of the rents which it was shown went to him and his family from the land in suit, had applied them to the satisfaction of this prior note and deed of trust. This presumption accords with his duty as trustee, and also with the legal presumption that whatever possession his wife had of the note and deed of trust was in law his possession, and that she held the same in subordination to his right of possession. We have already adverted to the fact that Mrs. Pierce did not testify in this case, and there is absolutely no evidence as to when she acquired possession of the note, or how she acquired it or out of what funds she paid for it, if she in fact did buy it, and there is an utter absence of any evidence showing or tending to show that she had any estate out of which she could have raised the money to purchase said note. There is nothing but the naked unexplained possession of the note and deed of trust by her years after the death of her husband, who was the trustee of her sister, to build up a presumption of an adverse holding against the heirs of her sister, the *cestui que trust* of her husband. The burden was upon her to establish an adverse, open, notorious possession in order to defeat the title of the plaintiffs, and we are of the opinion that the circuit court correctly held and

found that she did not sustain the burden, which was assumed by her claim of title by adverse possession, and accordingly the judgment of the circuit court decreeing the title in the plaintiffs is affirmed.

Fox, P. J., and Burgess, J., concur.

INDEX.

ACTIONS.

1. **Civil Suit.** The phrases "civil case" and "civil suit" refer to the legal means or proceedings by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words "criminal cases," which refer to public wrongs and their punishment. *State ex rel. v. Riley*, 175.
2. **Suit on Contract: Recovery on Another.** Where plaintiff sues on a special contract he must recover on that contract or not at all. Plaintiff alleged that defendant employed him to do certain painting at certain prices, he to furnish all the materials, and that he agreed to take all the materials defendant had on hand at the time he began the work at their reasonable market value, and defendant agreed to take back at their reasonable market value all the materials he had on hand at the time his employment ceased, and the petition is silent as to whether the contract was written or oral, but to prove his case he offered in evidence a written contract which contained no reference to the purchase of materials either at the beginning or completion of the work. *Held*, that, having elected to stand on the written contract, he cannot recover on a contract, part of which was written and part oral. *Koons v. St. Louis Car Co.*, 227.
3. ———: **Quantum Meruit.** A suit which is clearly one on contract, as shown by both the petition and evidence, cannot be considered one of *quantum meruit*. *Ib.*

ADMINISTRATION.

Witness: Party to Contract: Where Administrator is Party. Where the administrator is a party to the action, the surviving party is disqualified to testify for any purpose until after the will is probated or the administrator is appointed; and much of the confusion attending the statute is due to a failure to observe this arbitrary distinction which it makes. *Weiermueller v. Scullin*, 466.

APPEALS.

1. **Appellate Practice: New Defense: Usurious Contract.** A defense to the special taxbill not raised in the trial court will not be considered on appeal. Whether or not the contract between plaintiff and the contractor, by which plaintiff advanced to the contractor money to carry on the work, was usurious, will not be considered on appeal, if that defense to the taxbill was not made in the trial court. *Dickey v. Porter*, 1.
2. **Transcript: Criminal Cases.** Counsel in a criminal case should superintend the making up of the transcript, and see to it that it is properly certified and otherwise complies with the law and the rules of the court. *State v. Paulsgrove*, 193.

APPEALS.—Continued.

3. **Appellate Jurisdiction: Injunction.** Where the suit is an injunction pure and simple and no constitutional question is involved, and the final decree from which the appeal is taken simply perpetuates the injunction against the defendants and adjudges costs against them, the Supreme Court has no jurisdiction of the appeal. *Moffatt v. Board of Trade*, 277.
4. **New Point: Two Defendants: Joint Control of Train.** Where the point was not raised in the original brief, or in the trial court, that the evidence does not support the allegation that the train which inflicted the injuries on deceased was under the control of both defendants, the point was not timely raised. *Johnson v. Railways*, 381.
5. **Appellate Jurisdiction: Title to Real Estate: Homestead.** An adjudication, upon a motion to quash, that land levied upon under execution is defendant's homestead does not involve title to real estate, and therefore the appeal from a judgment adjudging that the land levied upon was defendant's homestead, is to the proper court of appeals. In determining whether or not homestead exists, the court begins with the necessary concessions that the title is vested in defendant; and a holding that homestead does or does not exist, does not divest that title. A sequence of a judgment that there is no homestead may be to divert defendant's title by sale under execution, but that would be an indirect, not a direct effect of the judgment. In arriving at that judgment, the court does not consider the question of title, but whether the statutory conditions are present which entitle the husband to homestead. *Snodgrass v. Copple*, 480.
6. ———: **Homestead.** It is not a mere exemption, but an estate in lands, that vests in the head of a family, and it is not an exemption, but a life estate in lands, that vests in the widow at his death, as the statute declares; and as an adjudication of the existence of a homestead must necessarily determine the existence of that estate, and determine the inchoate right of the widow and children thereto, an appeal from a judgment on a motion to quash the execution on the ground that defendant had a homestead in the land levied upon, necessarily involves title to real estate, within the meaning of the constitutional provision governing appeals—as much so as would a suit in ejectment against the same defendant after sale of the land under execution, where the defense would be the existence of a homestead, and such suit would be appealable to this court alone. [Per GRAVES, J.] *Ib.*
7. ———: ———: **What Is Title?** "Title to real estate" means an estate for life or for years, as well as a fee simple interest. [Per GRAVES, J.] *Ib.*
8. ———: ———: **Questions involved.** Not simply such questions as, is defendant the head of a family? are involved in the homestead inquiry, but the ultimate question is, does defendant have a homestead? And that means, does defendant have a vested estate in the lands? A homestead interest, as created by the statute, is an interest in real estate; and that being the fact, title to real estate is involved in any litigation that determines the existence of a homestead. [Per GRAVES, J.] *Ib.*
9. **No Bill of Exceptions.** Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed. *State v. Lakin*, 548.

APPEALS.—Continued.

10. **Remarks of Counsel: Abuse of Defendant and His Counsel: Reversible Error.** The prosecuting attorney, in his closing argument to the jury, said: "The attorney for the defendant has tampered with the witnesses; you know it, and I know it, and he ought to be convicted for it; and, too, the attorney for the defendant has attempted to buffalo and bulldoze this court and myself. . . . The defendant is a scoundrel and a perjurer, and ought to be convicted." Defendant objected to the remarks at the time they were made, and requested the court to instruct the jury to disregard them in considering of their verdict, but this the court failed to do, but simply requested the prosecuting attorney to keep within the record. *Held*, reversible error. *State v. Clapper*, 549.
11. ———: **Not in Motion for New Trial.** Improper remarks of counsel not called to the court's attention in the motion for new trial can not be considered on appeal. *Ib.*
12. **No Bill of Exceptions.** Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed. *State v. Griffith*, 573.
13. **Motion for New Trial: Indefinite Assignment.** An assignment in the motion for new trial that the court erred in admitting illegal and irrelevant testimony, is not sufficiently definite; and the appellate court will not go through the record to discover such testimony. *State v. Holden*, 581.
14. **No Bill of Exceptions.** Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed. *State v. McGinnis*, 590.
15. **Overruling Motion for New Trial: No Exception.** Where the record shows that appellant failed to preserve by bill of exceptions any exception to the action of the court in overruling the motion for new trial, there is nothing for the appellate court to review except the record proper. *State v. Libby*, 596.
16. **Improper Examination: General Assignment.** An assignment that the court erred in permitting the prosecuting attorney to ask immaterial, impertinent and insolent questions, is too general to call for consideration by the appellate court. *State v. Howard*, 600.
17. **Bill of Exceptions: Expiration of Time: Mistake.** A bill of exceptions filed after the expiration of the time granted cannot be considered on appeal. And the fact that defendant's counsel was misled by the prosecuting attorney as to the expiration of the time, does not authorize the appellate court to consider the bill of exceptions filed after the time had expired. *State v. Moore*, 624.
18. **No Bill of Exceptions.** Where there is no bill of exceptions, and the record proper is free from error, the judgment will be affirmed. *State v. Keene*, 680.
19. **Bill of Exceptions: Expiration of Time: Extension Thereafter: Judge Absent.** The authority of a judge to sign a bill of exceptions in vacation and make it a part of the record, is purely statutory in this State. After the expiration of the time

APPEALS.—Continued.

granted within which to file a bill of exceptions, neither the court nor the judge in vacation can extend it, and a bill of exceptions filed in pursuance of such a void order will not be considered on appeal. And this is true, notwithstanding the judge is absent from the State when the bill of exceptions is delivered at his chambers within the time allowed. *State v. Paul*, 681.

20. **Parole of Prisoner: After Appeal and Affirmance of Judgment.** The circuit court, after an appeal by a convicted defendant and an affirmance of the judgment, and a direction by the Supreme Court that the sentence pronounced by the circuit court be executed and that the marshal arrest defendant and deliver him to the warden of the penitentiary, has no power to parole defendant. Nor does the circuit court, between the time of the affirmance of the judgment and the arrest of defendant, have power to parole him. The statute expressly provides that the Supreme Court, when a judgment of conviction is affirmed, shall direct that the sentence pronounced below shall be executed. *Ex parte Folster*, 687.
21. ———: ———: **Repeal by Implication: Appeal Pending.** Section 2827, Revised Statutes 1899, providing that no parole shall be granted in any case while an appeal is pending, did not by implication confer power on the circuit court to grant a parole after affirmance of the judgment, when the appeal is no longer pending. That provision did not, by implication, repeal the provisions of section 2705 which expressly requires the Supreme Court, when a judgment is affirmed, to direct that the judgment of the trial court be executed. *Ib.*

ARREST.

Warrant: Immaterial. Whether or not the police officer had a warrant for defendant's arrest at the time he broke into defendant's house and discovered the stolen property in his possession, is immaterial in this prosecution of defendant for burglary and larceny. *State v. Howard*, 600.

ASSAULT.

With Intent to Kill: Shooting At One, Hitting Another. The gravamen of the offense of assault with intent to kill, is the intent with which the shot was fired. And where defendant is charged with felonious assault upon D., and the evidence shows that he shot at W. and the shot took effect upon D., he can not be convicted of assault with intent to kill D. *State v. Williamson*, 591.

ASSIGNMENT.

1. **Taxbill: Ownership.** Where defendants assert by way of new matter that plaintiff before the beginning of the suit assigned and delivered the taxbill sued on to a brokerage company, they are not in a position to insist on a general denial to the effect that he was never the owner of the taxbill, for if he assigned it he owned it, and an allegation that he assigned it is inconsistent with an assertion that he never owned it. *Dickey v. Porter*, 1.

ASSIGNMENT.—Continued.

2. ———: **Assignment of Contract and Subletting.** There is a palpable difference between assigning moneys due under a contract and an assignment of the contract itself. The borrowing of money from plaintiff by the contractor, and securing him for the loan by a contract assigning to him the special taxbills to be issued, and the employment by plaintiff of a competent engineer to see that the contractor carries out his contract with the city, is not an assignment of the contract to plaintiff, nor a subletting to him of the work. *Ib.*

ATTORNEYS.

1. **Champertous Contract: Expenses.** There are many necessary and proper expenses an attorney may contract to pay in connection with the prosecution of a lawsuit. *Kelerher and Little v. Henderson, 498.*
2. ———: **Costs.** In one contract the clients (plaintiffs) agreed to pay one-half of all reasonable expenses that may be necessary and proper to expend for a successful prosecution of suits on county bonds, and that contract referred to another between the attorneys (defendants) and the bondholders in which the attorneys agreed to pay all costs of whatever nature in case of the loss of any suit. *Held*, in a suit by the clients against the attorneys for their proportion of the moneys realized from the suits, that even if the agreement as a whole be construed to mean that the attorneys would pay one-half of the costs of the suits, that was their fault, and it should not be visited on the plaintiffs in the face of their express agreement to pay one-half of all proper and reasonable expenses. *Ib.*
3. **Remarks of Counsel: Abuse of Defendant and His Counsel: Reversible Error.** The prosecuting attorney, in his closing argument to the jury, said: "The attorney for the defendant has tampered with the witnesses; you know it, and I know it, and he ought to be convicted for it; and, too, the attorney for the defendant has attempted to buffalo and bulldoze this court and myself. . . . The defendant is a scoundrel and a perjurer, and ought to be convicted." Defendant objected to the remarks at the time they were made, and requested the court to instruct the jury to disregard them in considering of their verdict, but this the court failed to do, but simply requested the prosecuting attorney to keep within the record. *Held*, reversible error. *State v. Clapper, 549.*
4. ———: **Not in Motion for New Trial.** Improper remarks of counsel not called to the court's attention in the motion for new trial can not be considered on appeal. *Ib.*

AUTOMOBILES.

1. **Rights on Highway.** Automobiles, operated and propelled in a manner not incompatible with the safety of the travelling public, have equal rights with other vehicles upon the public highways, subject to such rules and regulations as are prescribed by law. *State v. Swagerty, 517.*
2. **Constitutional Law: Special Legislation.** While an act which refers to particular persons or things of a class is a special law, when the conditions reasonably justify the distin-

AUTOMOBILES.—Continued.

guishing of a class, and the act affects equally all who come within that class, such act is not within the constitutional inhibition against the enactment of special legislation. *State v. Swagerty*, 517.

3. ———: ———: **Automobile Act of 1903.** The Automobile Act of 1903, regulating the operation and speed of automobiles on the public streets, roads and highways, is not unconstitutional as special legislation merely because it does not apply to all vehicles using the public highways. It applies to and affects alike all persons, corporations, etc., engaged in operating automobiles, and it is, therefore, a general and not a special law. *Ib.*
4. **Automobile Act: Police Power.** The Automobile Act of 1903 is a police regulation, and its enactment was clearly within the power of the Legislature. *Ib.*
5. ———: **Independent Sections: Speed.** In a prosecution for a violation of section 2 of the Automobile Act of 1903, prohibiting the running of automobiles at a greater rate of speed than nine miles per hour, the validity of section 4 of said act, requiring operators of automobiles to obtain licenses, is not involved. *Ib.*
6. ———: **Speed Limit: Reasonableness.** The courts have nothing to do with the reasonableness or unreasonableness of an act of the Legislature which it was within its power to enact, and this court will not declare that a speed limit of nine miles per hour for automobiles is unreasonable. *Ib.*

BENEFIT ASSESSMENTS.

- 1 **Taxbill: Assignment: Ownership.** Where defendants assert by way of new matter that plaintiff before the beginning of the suit assigned and delivered the taxbill sued on to a brokerage company, they are not in a position to insist on a general denial to the effect that he was never the owner of the taxbill, for if he assigned it he owned it, and an allegation that he assigned it is inconsistent with an assertion that he never owned it. *Dickey v. Porter*, 1.
2. ———: ———: **Pledge: Real Party in Interest.** Where the owner of a taxbill has pledged it as collateral security for the payment of a note of less amount he owes a bank, he still has such an interest in it as entitles him to bring suit thereon to preserve and enforce the lien of the taxbill. Notwithstanding the pledge, the title does not pass to the pledgee, but still remains in the pledgor, subject to the pledgee's lien — just as in the case of a mortgage. *Ib.*
3. ———: ———: ———: **Equity: Code.** The General Assembly, in creating the Code, and in providing for but one form of action, and in providing that that shall be prosecuted in the name of the real party in interest, in substance adopted the equity rule which had theretofore prevailed, that the assignee of an assigned instrument might sue in his own name, he being the real party in interest, and that the pledgor of a pledged instrument being one of the real parties in interest (and being especially interested, for instance, in preserving and enforcing the lien of the pledged special taxbill), should at least be one of the parties plaintiff. *Ib.*

BENEFIT ASSESSMENTS.—Continued.

4. ———: ———: ———: ———: **Defect of Parties: Not Raised by Answer.** It is competent for both the pledgor and pledgee to join in a suit to preserve and enforce the lien of a special taxbill, but if the suit is brought by the pledgor alone, and the defect of parties does not appear on the face of the petition, it can be raised only by answer. Ib.
5. ———: ———: ———: ———: **Payment.** If between the time the suit is brought by both the pledgor and pledgee and the trial, the debt, to secure which the pledged special taxbill was held by the pledgee as collateral security, is paid, the pledgee is no longer a necessary party to an action to enforce the lien of the special taxbill, or to recover a judgment thereon if the lien has expired, and if the attention of the court is called to that fact the name of the pledgee should be stricken out. Ib.
6. ———: ———: ———: ———: **Pledgee Alone: Trustee.** The pledgee of a lien (for instance, a special taxbill) may bring suit in his own name to enforce the lien, but the extent of his recovery for himself will be the amount of the debt the pledgor owes him, and he will be a trustee for the pledgor for the overplus. But that does not mean that the pledgor, where he is the real party in interest, may not also bring the suit either alone, or by joining with the pledgee as plaintiff. Ib.
7. ———: **Payment to Wrong Party.** Under the charter of Kansas City, the owners of abutting property against which a special taxbill has been issued in payment of a sewer, can avoid all danger of paying the amount of the taxbill to the wrong party by paying it to the city treasurer. Ib.
8. ———: **Signed by President of Board.** A taxbill is not void because the signature of the president of the board of public works was signed by an officer designated for that purpose as provided in the charter. A reasonable construction of the charter does not require the president of the board with his own hand to do all the clerical work of making out special taxbills, but when they are issued by authority of the board and signed by its president by the party specially authorized by the resolution of the board to sign the president's name, all the substantial requirements of the charter are complied with. Such method of signature is only a method to attest the taxbill in the name of the president; it is not delegating to a clerk or other party the power to apportion the costs and assess each lot with its share and issue taxbills therefor. Ib.
9. ———: **Recitals: Total Area.** It is not essential that the taxbill show on its face every prerequisite step necessary to its validity. It is not void because it does not contain a recital of the total area of the lands subject to the assessment, or any affirmative or general statement that the lands described in the taxbill were charged according to the area of such tract of land. Ib.
10. ———: **Assignment of Contract and Sub-Letting.** There is a palpable difference between assigning moneys due under a contract and an assignment of the contract itself. The borrowing of money from plaintiff by the contractor, and securing him for the loan by a contract assigning to him the special taxbills to

BENEFIT ASSESSMENTS.—Continued.

be issued, and the employment by plaintiff of a competent engineer to see that the contractor carries out his contract with the city, is not an assignment of the contract to plaintiff, nor a subletting to him of the work. *Dickey v. Porter*, 1.

11. ———: **Usurious Contract: New Defense.** A defense to the special taxbill not raised in the trial court will not be considered on appeal. Whether or not the contract between plaintiff and the contractor, by which plaintiff advanced to the contractor money to carry on the work, was usurious, will not be considered on appeal, if that defense to the taxbill was not made in the trial court. *Ib.*
12. ———: **Thickness of Sewer Pipe: Specifications in Ordinance.** Where the ordinance provided that the work should conform to the plans and specifications then on file in the office of the board of public works, those plans and specifications were as much a part of the ordinance as if they had been set forth therein in detail; and as the ordinance itself provided that all sewers of twenty-one inches or less in interior diameter should be constructed of vitrified clay pipe, and all sewers two feet or more in interior diameter should be constructed of hard burned brick laid in hydraulic cement mortar, and as the specifications and contract on file with the board specifically described the thickness of the pipes, it is obvious the dimensions of the sewer pipe were not left to the discretion of the city engineer, and the taxbills are not therefore void. And especially should this be the holding where neither the answer nor the instructions made the point that the thickness of the sewer pipe was not sufficiently designated, and defendants contented themselves to raising that point only by an objection to the introduction of the ordinance in evidence. *Ib.*
13. ———: **Sewer: Masonry.** Where it is impossible, on account of the hills and character of clay, etc., to definitely state the amount of rubble masonry that will be required for carrying the sewers, and for courts and side protections, the taxbills are not void because of a failure of the ordinance to prescribe the length and quality of masonry required. If the quantity exceeds the estimates, the most the property-owners can demand is a credit on the taxbills for the excess; but if the amount is in substantial compliance with the contract, ordinance and charter, not even that credit should be allowed. *Ib.*

BILL OF EXCEPTIONS.

1. **No Bill.** Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed. *State v. Lakin*, 548.
2. ———. Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed. *State v. Griffith*, 573.
3. **Expiration of Time: Extension Thereafter.** An order extending the time for filing bill of exceptions, made after the expiration of the time originally granted, is void; and in such case there is nothing for the appellate court to review except the record proper. *State v. Cutberth*, 579.

BILL OF EXCEPTIONS.—Continued.

4. ———: ———. When the time granted for filing the bill of exceptions has expired, neither the judge in vacation nor the court at a subsequent term has power to extend the time. And a bill of exceptions filed in pursuance of such void order will not be considered on appeal. *State v. Granger*, 586.
5. Appeals: Overruling Motion for New Trial: No Exception. Where the record shows that appellant failed to preserve by bill of exceptions any exception to the action of the court in overruling the motion for new trial, there is nothing for the appellate court to review except the record proper. *State v. Libby*, 596.
6. Amendment: By Consent: New Trial: Nunc Pro Tunc Entry. When a bill of exceptions is filed, it becomes a part of the record of the court, and can only be changed or amended by a *nunc pro tunc* entry correcting the record. It can not be amended, by consent of defendant's counsel, the prosecuting attorney, and the judge who tried the case, so as to show an exception saved to the overruling of the motion for new trial; nor is the suggestion of the trial judge that it is usually understood that an exception is taken when a motion for new trial is overruled, sufficient ground for a *nunc pro tunc* entry correcting the record. *Ib.*
7. No Bill. Where no bill of exceptions is filed, and the record proper is free from error, the judgment will be affirmed. *State v. McGinnis*, 590.
8. Expiration of Time: Mistake. A bill of exceptions filed after the expiration of the time granted cannot be considered on appeal. And the fact that defendant's counsel was misled by the prosecuting attorney as to the expiration of the time, does not authorize the appellate court to consider the bill of exceptions filed after the time had expired. *State v. Moore*, 624.
9. No Bill. Where there is no bill of exceptions, and the record proper is free from error, the judgment will be affirmed. *State v. Keene*, 680.
10. Expiration of Time: Extension Thereafter: Judge Absent. The authority of a judge to sign a bill of exceptions in vacation and make it a part of the record, is purely statutory in this State. After the expiration of the time granted within which to file a bill of exceptions, neither the court nor the judge in vacation can extend it, and a bill of exceptions filed in pursuance of such a void order will not be considered on appeal. And this is true, notwithstanding the judge is absent from the State when the bill of exceptions is delivered at his chambers within the time allowed. *State v. Paul*, 681.

BURGLARY.

1. Sufficiency of Evidence. Evidence held sufficient to support a conviction of burglary. *State v. Howard*, 600.
2. Burglary and Larceny: Conviction of Former. Where defendant is charged with burglary and larceny, the jury may find him guilty of the burglary alone, although the evidence also abundantly establishes the larceny. *Ib.*

BURGLARY.—Continued.

3. ———: **Sufficiency of Evidence.** Evidence in a prosecution for burglary and larceny *held* sufficient to justify the submission of the case to the jury. *State v. Toohey*, 674.
4. ———: **Proof of Other Crimes: Common Design: Evidence.** In a prosecution for burglary of and larceny from a certain Pullman car, it was not error to admit evidence tending to show that another car coupled to the former had been burglarized and articles stolen therefrom, the property taken from both cars having been sold at the same time and place by defendant and his coindictee. The evidence tended to show a common design to burglarize both cars, and the two crimes were so closely related that proof of the one tended to establish the other. And, for the same reason, it was not error to permit the State to prove that defendant and his coindictee were seen together on the afternoon of the day on which the crime was committed, in the cab of a locomotive engine, defendant breaking off pieces of brass from the engine, and his coindictee picking them up. *Ib.*
5. ———: **Disposition of Stolen Property: Evidence.** No error was committed in permitting a witness for the State to testify that on the afternoon of the alleged burglary and larceny defendant and his coindictee came to witness's junk shop and sold to him some of the articles alleged to have been stolen. Although the stolen property may have been partly or even exclusively in the possession of defendant's coindictee at the time it was sold, yet defendant's presence was a circumstance tending to show his guilt. *Ib.*

CHAMPERTY.

1. **Pleading: New Matter: General Denial.** Under the statute when new matter is relied upon, in defense or in evidence, it must be set up in the answer. A general denial is not sufficient. If defendant intends to rely upon new matter which goes to defeat or avoid plaintiff's action, he must set forth in clear and concise terms each substantial fact intended to be so relied upon. *Kelerher and Little v. Henderson*, 498.
2. ———: ———: ———: **Champertous Contract.** Where plaintiff sues on a contract which contains no allegation in reference to champerty, defendant will not be permitted to interpose the defense of champerty unless he pleads it in his answer. That is "new matter" within the meaning of the Practice Act. *Ib.*
3. ———: ———: ———: ———: **On Face.** The rule that when a contract is offered in evidence and its immorality and illegality appear on its face a recovery will be denied even though the answer is a general denial, does not apply where the client agrees to pay one-half of any and all reasonable expenses or sums of money that may be necessary and proper to insure the successful prosecution of the suit, for such a contract is not champertous on its face. It cannot be said to be an agreement to pay costs of the suit. *Ib.*
4. **Attorney: Champertous Contract: Expenses.** There are many necessary and proper expenses an attorney may contract to pay in connection with the prosecution of a lawsuit. *Ib.*

CHAMPERTY.—Continued.

5. ———: ———: **Costs.** In one contract the clients (plaintiffs) agreed to pay one-half of all reasonable expenses that may be necessary and proper to expend for a successful prosecution of suits on county bonds, and that contract referred to another between the attorneys (defendants) and the bondholders in which the attorneys agreed to pay all costs of whatever nature in case of the loss of any suit. *Held*, in a suit by the clients against the attorneys for their proportion of the moneys realized from the suits, that even if the agreement as a whole be construed to mean that the attorneys would pay one-half of the costs of the suits, that was their fault, and it should not be visited on the plaintiffs in the face of their express agreement to pay one-half of all proper and reasonable expenses. *Ib.*
6. **In Missouri.** The law of champerty exists in this State. *Ib.*
7. **Contract Must be Champertous.** The law does not impress its condemnation upon the subject-matter of the contract, but upon the contract itself. If the contract itself is not champertous, the court will not, when suit is brought on the contract, refused to enforce it simply because certain collateral portions of the contract or of the transaction are tainted with illegality. *Ib.*
8. **Counterclaim: Practice.** Affirmative defenses and counterclaims stand on the same footing that the petition does, and if no evidence is introduced in support thereof, they should be dismissed. *Ib.*

CHANGE OF VENUE.

1. **Civil Suit.** The phrases "civil case" and "civil suit" refer to the legal means or proceedings by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words "criminal cases," which refer to public wrongs and their punishment. *State ex rel. v. Riley*, 175.
2. ———: **Drainage District.** Under the provisions of section 818, Revised Statutes of 1899, providing that "a change of venue may be awarded in any civil suit," land-owners, upon a compliance with the statutory requirements, are entitled to a change of venue in a proceeding brought in the circuit court for the formation and incorporation of a drainage district for the reclamation of swamp and overflowed lands. Such a proceeding is a "civil suit" within the meaning of those words. *Ib.*
3. **Prohibition: Error.** If the application for a change of venue is not in conformity to the statutory requirements, or if the proper notice that an application for a change would be made was not given, then error in granting the change of venue may be corrected by an appeal. The court having jurisdiction to grant the change of venue, the Supreme Court will not by writ of prohibition prohibit it from exercising that jurisdiction, however erroneous its action may be. It is not the purpose of the writ of prohibition to correct errors of the trial court. *Ib.*
4. **Application Properly Overruled.** When the case was called for trial, the State announced ready, but defendant asked

CHANGE OF VENUE.—Continued.

for time in which to prepare an application for a continuance, which was granted. While waiting for the supposed application for a continuance, the court learned that defendant was preparing an application for a change of venue, whereupon the court called the case for trial, and so notified the defendant, who, after the jury were sworn upon their *voir dire* and the State had finished its examination of the jurors, filed his application for a change of venue. *Held*, that the application was properly overruled. *State v. Davis*, 616.

CHARITY. See *Wills*, 2 to 5.

CITIES, TOWNS AND VILLAGES.

1. **Constitution: Construction: City Indebtedness.** The Missouri Constitution was framed by plain men. Its language is plain, its purpose is plain; and it is the duty of courts not to subject its words to any over-nice or extraordinary gloss. When the thing done (for instance, the incurring of a debt by a city) was substantially that which was prohibited, it falls within the constitutional inhibition, simply because according to the true construction thereof, it falls within the thing prohibited. *State ex rel. v. City of Neosho*, 40.
2. ———: ———: ———: **Indirectly.** The incurring of indebtedness by a city beyond the maximum amount fixed by the Constitution is absolutely and unqualifiedly prohibited, no matter what the necessity, pretext or circumstance may be, or the form which the indebtedness is made to assume. The constitutional limit binds the courts, the General Assembly, the officials of the city and the people themselves. The city cannot do in an indirect or circuitous manner that which the Constitution has prohibited or enjoined it from doing directly. *Ib.*
3. ———: **City Indebtedness: Scaling Debt: Indivisible Contract.** Judicial power cannot scale a city debt down to a constitutional limit. Where the ordinance, by which the city issued bonds for the purchase of a waterworks plant and provided for the operation of the plant by the city and the payment to the owners of a stated net sum and in addition semiannual installments for a period of years, was one and an indivisible contract, if the debt thereby incurred is invalid because in excess, in the aggregate, of the maximum limit of five per cent, then the whole debt is invalid; in other words, if the semiannual installments are debts, and when they are added to the bonds (which of themselves are within the constitutional limit) the whole indebtedness exceeds the maximum limit, then the courts cannot declare the semiannual installments invalid, and the bonds valid. *Ib.*
4. ———: ———: **What is?** The word debt, in the sense the words "indebted" and "indebtedness" are used in the Missouri Constitution, means a promise by the municipality, grounded in a valid consideration, to pay to some person a sum of money now due and payable, or to become due and payable at a future date—an obligation resting on the debtor to pay, with a correlative right in the creditor to enforce payment. *Ib.*
5. ———: ———: **Contract: Double Intendment.** Whenever the words of a contract may have a double intendment, and the one agrees with law and the other is against the law, the in-

CITIES, TOWNS AND VILLAGES.—Continued.

tendment that agrees with law will be taken. The presumption is in favor of the legality of the contract. The law does not assume an intention to violate the law, nor will a contract be adjudged to be illegal where it is capable of a construction that will uphold it and make it valid. *Ib.*

6. ———: ———: ———: **Waterworks: Purchase: Bonds: Semi-annual installments: Payment Out of Particular Fund.** A city which could legally create an indebtedness not exceeding \$30,000, was authorized by ordinance approved by the voters in 1899 (by way of compromise of previous judgments and debts which the city owed a water company for hydrant rentals amounting to \$25,000 and liable in the future to amount to a much larger sum) to issue \$25,000 in bonds and acquire an existing waterworks plant, worth, including the judgment, etc., \$46,000, by paying \$25,000 cash therefor, and to receive all water rentals from consumers and pay the company out of the rentals so received \$875 semiannually for twelve years, or \$21,000, and if the city failed to pay the installments the company could temporarily take charge of the plant and receive the rentals until the installments then due were paid. *Held*, that the semiannual installments were not a debt, and that the bond issue was valid, and the contract (or ordinance) binding. The contract provided for a special or particular fund for the payment of the installments, without resorting to the power of public taxation, while the bonds were to be paid by means of taxation, and hence the debt to be paid by means of taxes was \$25,000.

Held, by Woodson, J., in a separate opinion, that the whole \$46,000 was a debt, but as the city under a prior valid ordinance had obligated itself to pay annually to the water company \$3,050 as hydrant rentals and had defaulted therein to the amount of \$25,000 at the time the compromise ordinance was adopted and would have been liable in an amount equal to \$61,000 on that account had the original ordinance continued in force until the end of the twenty-year period covered by it, and that obligation was renewed in the compromise ordinance, the sum of \$46,000 which the city by the compromise ordinance agreed to pay was not a new indebtedness, but a settlement of an existing indebtedness, and the Constitution containing no inhibition against the levy of a tax to pay a valid existing indebtedness in excess of five per cent of the value of the city property, the whole debt was valid. *Ib.*

7. **City: Trustee of Special Fund: Mandamus.** Where the city as a trustee of a special fund has accumulated that fund and holds it, it may be restrained from using it for any other purpose, and compelled by *mandamus* to turn it over to its owner. And where a city undertook to collect water rentals from a waterworks plant which it had bought from plaintiff's assignor, and to pay for it in semiannual installments out of water rentals for private water service, it will be compelled to use that fund to pay the installments.

Held, by Woodson, J., in a separate opinion, that the obligation of the city to pay the hydrant rentals having been determined to be valid by prior decisions of this court, and

CITIES, TOWNS AND VILLAGES.—Continued.

that obligation being renewed in the compromise ordinance by which the city agreed to operate the plant itself and pay the company semiannual installments, those installments were but a continuation of the original obligation, and the city can be compelled by *mandamus* to pay them. *Held*, also, that *mandamus* will lie notwithstanding plaintiff's claim has not been reduced to judgment. The validity of the rentals was litigated in the prior suits. *State ex rel. v. City of Neosho*, 40.

CONSPIRACY.

1. **Assault: Instruction: No Request.** There was no error in the court's failure to instruct as to the effect of a conspiracy followed by an assault upon defendant, for the reasons, first, there was no proof of such a conspiracy followed by an assault, and if there had been, the court's instruction on self-defense fully covered the law in that regard; and, second, the court's attention was not called to its failure to instruct on that point. *State v. King*, 560.
2. **Indictment: Evidence.** It is not necessary, in order to the admission of evidence of a conspiracy between defendant and others, that such others be included in the indictment. *State v. Vaughan*, 663.
3. **Murder, First Degree: Escaping from Prison: Killing Guards.** Defendants who killed a penitentiary guard while they were attempting to escape from the penitentiary where they were lawfully confined, were guilty of murder in the first degree, and the court properly refused to submit to the jury instructions as to murder in the second degree. [Following *State v. Vaughan*, 200 Mo. 1.] *Ib.*

CONSTITUTIONAL LAW.

1. **Constitution: Construction: City Indebtedness.** The Missouri Constitution was framed by plain men. Its language is plain, its purpose is plain; and it is the duty of courts not to subject its words to any over-nice or extraordinary gloss. When the thing done (for instance, the incurring of a debt by a city) was substantially that which was prohibited, it falls within the constitutional inhibition, simply because according to the true construction thereof, it falls within the thing prohibited. *State ex rel. v. City of Neosho*, 40.
2. ———: ———: ———: **Indirectly.** The incurring of indebtedness by a city beyond the maximum amount fixed by the Constitution is absolutely and unqualifiedly prohibited, no matter what the necessity, pretext or circumstance may be, or the form which the indebtedness is made to assume. The constitutional limit binds the courts, the General Assembly, the officials of the city and the people themselves. The city cannot do in an indirect or circuitous manner that which the Constitution has prohibited or enjoined it from doing directly. *Ib.*
3. ———: **City Indebtedness: Scaling Debt: Indivisible Contract.** Judicial power cannot scale a city debt down to a constitutional limit. Where the ordinance, by which the city issued bonds for the purchase of a waterworks plant and provided for the operation of the plant by the city and the payment to the owners of a stated net sum and in addition semiannual install-

CONSTITUTIONAL LAW.—Continued.

ments for a period of years, was one and an indivisible contract, if the debt thereby incurred is invalid because in excess, in the aggregate, of the maximum limit of five per cent, then the whole debt is invalid; in other words, if the semiannual installments are debts, and when they are added to the bonds (which of themselves are within the constitutional limit) the whole indebtedness exceeds the maximum limit, then the courts cannot declare the semiannual installments invalid, and the bonds valid. *Ib.*

4. ———: ———: What is? The word debt, in the sense the words "indebted" and "indebtedness" are used in the Missouri Constitution, means a promise by the municipality, grounded in a valid consideration, to pay to some person a sum of money now due and payable, or to become due and payable at a future date—an obligation resting on the debtor to pay, with a correlative right in the creditor to enforce payment. *Ib.*

5. ———: ———: Contract: Waterworks: Purchase: Bonds: Semi-annual installments: Payment Out of Particular Fund. A city which could legally create an indebtedness not exceeding \$30,000, was authorized by ordinance approved by the voters in 1899 (by way of compromise of previous judgments and debts which the city owed a water company for hydrant rentals amounting to \$25,000 and liable in the future to amount to a much larger sum) to issue \$25,000 in bonds and acquire an existing waterworks plant, worth, including the judgment, etc., \$46,000, by paying \$25,000 cash therefor, and to receive all water rentals from consumers and pay the company out of the rentals so received \$875 semiannually for twelve years, or \$21,000, and if the city failed to pay the installments the company could temporarily take charge of the plant and receive the rentals until the installments then due were paid. Held, that the semiannual installments were not a debt, and that the bond issue was valid, and the contract (or ordinances) binding. The contract provided for a special or particular fund for the payment of the installments, without resorting to the power of public taxation, while the bonds were to be paid by means of taxation, and hence the debt to be paid by means of taxes was \$25,000.

Held, by Woodson, J., in a separate opinion, that the whole \$46,000 was a debt, but as the city under a prior valid ordinance had obligated itself to pay annually to the water company \$3,050 as hydrant rentals and had defaulted therein to the amount of \$25,000 at the time the compromise ordinance was adopted and would have been liable in an amount equal to \$61,000 on that account had the original ordinance continued in force until the end of the twenty-year period covered by it, and that obligation was renewed in the compromise ordinance, the sum of \$46,000 which the city by the compromise ordinance agreed to pay was not a new indebtedness, but a settlement of an existing indebtedness, and the Constitution containing no inhibition against the levy of a tax to pay a valid existing indebtedness in excess of five per cent of the value of the city property, the whole debt was valid. *Ib.*

6. Public Health: Milk: Constitutional Ordinance. A city ordinance which imposes a fine on any person who sells or exposes for sale "milk containing less than three per cent by weight of butterfat, and 8.5 per cent of solids not fat, and

CONSTITUTIONAL LAW.—Continued.

seven-tenths of one per cent ash, of which fifty per cent is insoluble in hot water," does not violate any of the constitutional rights of the citizen. *St. Louis v. Langeland*, 225.

7. **Special Legislation.** While an act which refers to particular persons or things of a class is a special law, when the conditions reasonably justify the distinguishing of a class, and the act affects equally all who come within that class, such act is not within the constitutional inhibition against the enactment of special legislation. *State v. Swagerty*, 517.
8. ———: **Automobile Act of 1903.** The Automobile Act of 1903, regulating the operation and speed of automobiles on the public streets, roads and highways, is not unconstitutional as special legislation merely because it does not apply to all vehicles using the public highways. It applies to and affects alike all persons, corporations, etc., engaged in operating automobiles, and it is, therefore, a general and not a special law. *Ib.*
9. **Automobile Act: Police Power.** The Automobile Act of 1903 is a police regulation, and its enactment was clearly within the power of the Legislature. *Ib.*
10. ———: **Speed Limit: Reasonableness.** The courts have nothing to do with the reasonableness or unreasonableness of an act of the Legislature which it was within its power to enact, and this court will not declare that a speed limit of nine miles per hour for automobiles is unreasonable. *Ib.*

CONTRACTS.

1. **Double Intendment.** Whenever the words of a contract may have a double intendment, and the one agrees with law and the other is against the law, the intendment that agrees with law will be taken. The presumption is in favor of the legality of the contract. The law does not assume an intention to violate the law, nor will a contract be adjudged to be illegal where it is capable of a construction that will uphold it and make it valid. *State ex rel. v. City of Neosho*, 40.
2. **Suit on Contract: Recovery on Another.** Where plaintiff sues on a special contract he must recover on that contract or not at all. Plaintiff alleged that defendant employed him to do certain painting at certain prices, he to furnish all the materials, and that he agreed to take all the materials defendant had on hand at the time he began the work at their reasonable market value, and defendant agreed to take back at their reasonable market value all the materials he had on hand at the time his employment ceased, and the petition is silent as to whether the contract was written or oral, but to prove his case he offered in evidence a written contract which contained no reference to the purchase of materials either at the beginning or completion of the work. *Held*, that, having elected to stand on the written contract, he cannot recover on a contract, part of which was written and part oral. *Koons v. St. Louis Car Co.*, 227.
3. ———: **Part Oral and Part Written.** Plaintiff contends that the original contract was verbal and entire and a part only was reduced to writing, and for that reason the rule that parol

CONTRACTS.—Continued.

- contemporaneous evidence cannot be introduced to vary the terms of the written instrument does not apply. *Held*, that the contention cannot be upheld in this case, for three reasons: *first*, such a contract must be pleaded, which was not done; *second*, the rule never applies except where the part of the contract which is reduced to writing shows upon its face that it is incomplete and that it does not purport to be a complete expression of the agreement; and, *third*, the plaintiff repeatedly stated in his testimony that the verbal contract was not made until after the written contract was executed. *Ib.*
4. ———: Alteration. A material alteration by plaintiff of his copy of the written contract made in duplicate nullified the contract, and the whole contract is void when suit is instituted on the altered part. *Ib.*
 5. ———: ———: Validity Admitted in Answer: Knowledge. An admission in the answer made upon a misapprehension of the facts is not admissible in evidence to make out plaintiff's case. An admission of the validity of the contract sued on, without knowledge that it had been altered, does not breathe new life into the contract rendered void by the alteration, and does not constitute an admission of the facts stated in the petition. *Ib.*
 6. ———: ———: Fraudulent Intent. A material alteration of a written contract, even though done with no fraudulent intent, but in good faith in order to make it conform to the real agreement between the parties, nullifies the contract. *Ib.*
 7. ———: Modified by Parol: Pleading. Parties to a written contract may by a subsequent oral agreement upon a sufficient consideration change or modify it; but plaintiff cannot plead the original contract and recover on the modified contract. In a suit based upon the modified contract, that contract must be distinctly pleaded. It is not competent by general allegations in the petition to blend the provisions of the written and parol contracts as if the suit were based on one written contract. *Ib.*
 8. ———: Quantum Meruit. A suit which is clearly one on contract, as shown by both the petition and evidence, cannot be considered one of *quantum meruit*. *Ib.*
 9. Implied Contract: Physician: Services Rendered Defendant's Adult Son. A promise to pay for the services is not implied from the fact that a father calls a physician to attend his sick son who is a man of mature age; but when the circumstances are such as to lead the physician to believe, and to charge the father with knowledge that the physician believes, that the father is undertaking to pay for the services to be rendered, the father is liable. And in some cases it is for the jury to draw the inference of an implied contract from the facts. *Morrell v. Lawrence*, 363.
 10. ———: ———: ———: Question for Jury: This Case. The relation of physician and patient had existed between plaintiff and defendant's son for several years, the physician residing in St. Louis, and the son and defendant mostly in New York. For the services prior to 1900 the son paid the physician's bills. In 1900 the son went to Europe and the plaintiff went as his attending physician, he testified upon the request of defendant and his promise to pay for the services, but on his return, de-

CONTRACTS.—Continued.

- defendant refused to pay, a misunderstanding arising between him and plaintiff, and the son settled the matter. In 1902, the son being then forty-two years old, a man of considerable means carrying on a business of his own, living not with his father but at a hotel in the same city with him, the father telegraphed to plaintiff: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday via Big Four. Answer at once." Plaintiff gave up his business in St. Louis, and on the next day started for New York, and on arrival there was met by defendant's messenger, taken to defendant's house, and by him to see the son, and treated the son for forty days, until his death. *Held*, that, under the circumstances, the question of whether or not there was an implied contract on defendant's part to pay, that is, whether or not the defendant intended plaintiff to understand and the plaintiff did understand that defendant would pay for the services which the telegram called him to render, was properly submitted to the jury. *Morrell v. Lawrence*, 363.
11. ———: ———: **Value of Services: Wealth of Defendant.** The court should not instruct the jury, on the issue of the measure of damages, to take into consideration the fact that defendant is a wealthy man. The physician, if entitled to recover at all for services rendered a patient, is entitled to recover the reasonable value of the services rendered, no more and no less, whether defendant be rich or poor. In such case, the jury have no concern with the question of defendant's ability to satisfy the judgment. *Ib.*
 12. ———: ———: ———: ———: **When Admissible.** If the defendant should introduce evidence to show that plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plaintiff should have the right to show in rebuttal, if such were the fact, that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. To that extent, and under those conditions, the wealth of defendant may be shown. *Ib.*
 13. ———: ———: ———: ———: **Erroneous Instruction: Cured by Another.** In one instruction the jury were told that "in determining what is the reasonable value of the services rendered by the plaintiff" as a physician, they should take into consideration the ability of the defendant to pay. *Held*, that this error was not cured by another instruction which told the jury that "the evidence touching the financial ability of defendant may be considered by the jury not to enhance the fees above a reasonable compensation, but solely to determine whether defendant is able to pay a fair and just and reasonable compensation for the services rendered." *Ib.*
 14. ———: ———: **Evidence: General Reputation.** Where plaintiff sues for professional services rendered by him as a physician to defendant's son in New York, and alleges these services to be worth so much, and makes no claim for a loss from his usual income by reason of his absence from home in the service of defendant, testimony that he was a physician of good reputation in the community of his home, is not competent. It is competent to show that he is a physician of learning

CONTRACTS.—Continued.

and skill, and that fact should be taken as an element in estimating the value of the services rendered, but his general reputation as a physician has no more to do with his case than his general reputation as a man. *Ib.*

15. ———: ———: **Instruction: Assuming Verdict for Plaintiff.** An instruction should not apparently assume that the jury is going to find for plaintiff and assess the value of the services in question, and be limited to directions to the jury as to what they are to take into consideration in making the assessment. The jury should be given to understand that before they reach the question of the amount of their award, they should determine the main issue of whether or not they will find for plaintiff, such as, "If the jury find for plaintiff, then in determining what is the reasonable value of the services rendered, they will take into consideration," etc. *Ib.*
16. ———: ———: **Services Rendered Defendant's Son: Evidence: Financial Ability of Son.** Where plaintiff sues defendant for professional services rendered his son, and knew in a general way the financial standing of both father and son, it is error to exclude evidence offered by defendant to show that the son was a man of considerable fortune and amply able to pay for the services rendered. Such evidence bears on the issue of the existence of defendant's implied promise to pay, that is, it would naturally militate against plaintiff's inference that defendant intended to pay for the services. *Ib.*
17. ———: ———: ———: **Excessive Verdict.** It is peculiarly within the province of the trial judge to set aside a verdict as being excessive. *Ib.*
18. **Champerty: Contract Must be Champertous.** The law does not impress its condemnation upon the subject-matter of the contract, but upon the contract itself. If the contract itself is not champertous, the court will not, when suit is brought on the contract, refuse to enforce it simply because certain collateral portions of the contract or of the transaction are tainted with illegality. *Kelerher and Little v. Henderson*, 498.

CORPORATIONS.

1. **Lease: Power of Named Lessee to Acquire.** By an ordinance of the city of St. Louis several railroad companies therein named, "and their successors and assigns, are hereby severally authorized to sell, convey, or lease, if found desirable, their property, rights, privileges and franchises now owned and held, or herein granted, respectively, to any of the said companies named in this section, or to the St. Louis Transit Company, its successors or assigns," and "the said company and its successors and assigns so acquiring such property, rights, privileges and franchises, is hereby authorized to acquire, hold and enjoy the same during the term of this ordinance." The United Railways Company was not one of the companies named, but it acquired by purchase all the properties of those named, including the railway on which plaintiff was injured, and undertook to lease all the properties so acquired to the Transit Company. *Held*, that ordinance authorized a lease to

CORPORATIONS.—Continued.

the Transit Company. The city had authorized the Transit Company to acquire said railway by lease, and if the original owner could grant the lease to that company, so could a lawful purchaser do so. *Moorshead v. United Railways Co.*, 121.

2. ———: ———: **Successors and Assigns.** The consent of the city to said lease is not dependent on the use of the words "successors and assigns" after the words "the Transit Company," but is to be found in the words of the ordinance which named the Transit Company itself as the lessee. *Ib.*
3. ———: **By One Railway Company to Another: Good Faith.** If an agreement by which one street railway company transferred all its properties, privileges and franchises to another, was not entered into in good faith and for the purpose declared, but to defeat its creditors or to enable its properties and franchises to be held by such other for its benefit in a manner that would screen it from judgments and relieve it of responsibility, it will be held liable without regard to the contract. But such an issue would be for the jury unless the instrument itself, or facts in evidence, show the truth beyond dispute. *Ib.*
4. ———: ———: **Agent: Partners.** The United Railways Company of St. Louis by agreement transferred to the Transit Company not only the right to operate its railways for a period of forty years, but every franchise held by it except the franchise to be a corporation, all its property, real, personal and mixed, all income derived from its bonds and stocks, and the money it had on hand at the date of the agreement and what it might receive afterwards by the sale of unusable property; and besides binding itself to operate the railways, the Transit Company bound itself to do various acts, such as keeping them in repair, making extensions and improvements and meeting the interest on bonded obligations, and to pay the other company for the possession and use of the property during the stated period, the payments to be made at regular intervals and bearing all the characteristics of a fixed rent charge; and the contract provided for the reversion of the property to the grantor at the end of the term, and for a re-entry if the grantee defaulted in the performance of its covenants during the term. *Held*, that by the agreement the United Railways Company did not constitute the Transit Company its agent, nor did the agreement make them partners, but it was a lease. *Ib.*
5. ———: ———: **Goods, Etc.** Goods, chattels and franchises may be leased as well as lands and tenements. *Ib.*
6. ———: ———: **Liability of Lessor for Lessee's Torts.** Where the statute gives a street railway company express power to lease all of its properties to another street railway company, as the statute of this State does, the lessor is not liable in damages for injuries to a passenger resulting from the negligence of the lessee, unless such liability is expressly reserved in the statute. [*Distinguishing Markey v. Railroad*, 185 Mo. 348.] *Ib.*
7. **Statutes: Time of Taking Effect: Revision Session: Lease.** A statute with an emergency clause, approved June 19, 1899, authorizing one street railway company to lease all its properties to another, went into effect at once, although it was printed in the Revised Statutes of 1899 as a new section. *Ib.*

CORPORATIONS.—Continued.

8. ———: Lease: Companies Already Organized. The act of June 19, 1899, by section 15 conferred on any existing street railway company which filed with the Secretary of State its acceptance of the act and paid the required fees, the power to lease its properties. *Ib.*
9. ———: ———: ———: Acceptance Shown. Where plaintiff seeks to hold liable for her tortious injuries the street railway company which has leased its properties to another company, and for the purpose of fastening liability upon it introduces the lease in evidence, the burden is not on the company to show that it has filed with the Secretary of State its acceptance of the provisions of the act authorizing it to make the lease. In such case, in the absence of proof to the contrary, the presumption is that both companies have complied with the provisions of the statute. *Ib.*
10. Lease: To Railway Company: Torts: Liability of Lessor: Statute. When the lease of the franchises and railways of one street railway company to another is authorized by statute, the leasing company remains liable to third persons for the torts of the lessee, if the statute so says; and where the lease is not authorized by statute, the lease does not relieve the lessor of its public duties and responsibilities, but the lessor remains liable for the torts of the lessee. But where the statute does authorize the lease, without any reservation in the act of liability on the part of the lessor to third parties, for the torts of the lessee, the lessor is not liable for those torts. And where the statute expressly authorizes one street railway company "to sell, lease or dispose of by any other lawful contract, to any other street railway company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character and description," the lessor is not liable for the lessee's negligent injury of a passenger in the operation of a street car, and the General Assembly did not intend that it should be. The right to dispose of its corporate franchise being given to the grantor, it necessarily follows that it was not to be held liable for the torts of the grantee; and that conclusion is inevitable where the lessor is given the right to dispose of all its properties. *Ib.*
11. ———: ———: ———: ———: Public Policy. The very highest policy of a State is its statutory law. But the question of the liability of the lessor for the torts of the lessee is not to be determined by public policy. It is not a question of public policy, but of legislative intention—of statutory construction. *Ib.*
12. ———: To Irresponsible Company: Liability of Lessor for Lessee's Torts. The mischief which it is supposed by some courts that would result if leasing railway companies are not held responsible for the torts of the lessee, namely, that leases to irresponsible companies would be made for the purpose of evading liability, is met in this State by two answers: first, if that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible; and, second, our statutes require one-half of the capital stock of a street railway company to be subscribed and ten per cent of the subscription to be paid up in cash, and to that extent, at least, the lessees would have to start with assets. *Ib.*

CORPORATIONS.—Continued.

13. ———: **Incidents.** One of the incidents of a lease, unless there are covenants to the contrary, is that if the demised property (lands or chattels) is turned over to the lessee in good condition, the lessor is not thereafter liable to third parties for damages resulting from the negligent use of the property by the lessee; and where the statute empowers the lessee to operate the demised street railway, unless the power of control is reserved by the lessor in the lease, the operation will be without any interference by the lessor, and that necessarily means that the lessor is not answerable to a passenger negligently injured on a street car operated by the lessee — the injury being due to the sudden starting of that car too quickly after the passenger had boarded the car and thereby throwing her down. *Moorshead v. United Railways Co.*, 121.

CRAP TABLE. See *Gambling*.

CRIMINAL LAW.

1. **Insanity: Excuse for Crime.** One may be partially insane and yet responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the accused incapable at the time of committing the offense of distinguishing between the right and the wrong in reference to the particular act charged and proven against him. *State v. Paulsgrove*, 193.
2. ———: **Question for Jury.** Where the instructions given on both sides fairly and fully submit to the jury the issue as to the sanity or insanity of the defendant and his criminal responsibility in the killing of his sweetheart, and there is evidence that tends to support the defense that he was not responsible for the homicide and ample evidence to the contrary, and no error was committed in the admission and exclusion of evidence, the issue is one for the jury to determine; and if their finding is free from bias and prejudice, the court will not interfere therewith. *Ib.*
3. **Automobiles: Rights on Highway.** Automobiles, operated and propelled in a manner not incompatible with the safety of the traveling public, have equal rights with other vehicles upon the public highways, subject to such rules and regulations as are prescribed by law. *State v. Swagerty*, 517.
4. **Constitutional Law: Special Legislation.** While an act which refers to particular persons or things of a class is a special law, when the conditions reasonably justify the distinguishing of a class, and the act affects equally all who come within that class, such act is not within the constitutional inhibition against the enactment of special legislation. *Ib.*
5. ———: ———: **Automobile Act of 1903.** The Automobile Act of 1903, regulating the operation and speed of automobiles on the public streets, roads and highways, is not unconstitutional as special legislation merely because it does not apply to all vehicles using the public highways. It applies to and affects alike all persons, corporations, etc., engaged in operating automobiles, and it is, therefore, a general and not a special law. *Ib.*

CRIMINAL LAW.—Continued.

6. **Automobile Act: Independent Sections: Speed.** In a prosecution for a violation of section 2 of the Automobile Act of 1903, prohibiting the running of automobiles at a greater rate of speed than nine miles per hour, the validity of section 4 of said act, requiring operators of automobiles to obtain licenses, is not involved. *Ib.*
7. ———: **Speed Limit: Reasonableness.** The courts have nothing to do with the reasonableness or unreasonableness of an act of the Legislature which it was within its power to enact, and this court will not declare that a speed limit of nine miles per hour for automobiles is unreasonable. *Ib.*
8. **Instruction: Provoking Difficulty: No Evidence.** The giving of an instruction on the subject of provoking the difficulty, where, as in this case, there is no evidence upon which to base it, is reversible error. *State v. Edwards*, 528.
9. ———: **On Lower Grade of Offense: Erroneous.** Although a defendant cannot complain of a proper instruction covering a lower grade of offense than that of which the evidence shows him to be guilty, he has the right to challenge an instruction which erroneously declares the law as to such offense. *Ib.*
10. ———: **Threats: Provocation: Reducing Grade of Crime.** The admission of threats by deceased against defendant is confined to that class of cases in which the evidence tends to show some act or conduct on the part of the deceased which threatens immediate injury to defendant, or which tends to prove that the homicide was committed in self-defense. And it was error to instruct the jury that such threats constituted an element of provocation which would reduce the homicide from murder to manslaughter. *Ib.*
11. ———: **On Self-Defense: Argumentative.** Where the court has, by its instructions, fully declared the law of self-defense, it is not error to refuse an instruction, requested by defendant, which is argumentative and theoretical, rather than a plain declaration of law. *Ib.*
12. **Threats: Uncommunicated: For What Purpose Admitted.** Uncommunicated threats made by deceased are admissible, not for the purpose of showing apprehension of danger, but as throwing light upon the acts and conduct of deceased at the time of the fatal difficulty, and as tending to show who was the aggressor. *Ib.*
13. **Evidence: Cross-Examination.** It was not error to ask defendant's son, on cross-examination, whether he did not say in the presence of another party, after having heard of the killing, "Well, it has happened." Great latitude should be allowed in the cross-examination of such a witness. *Ib.*
14. ———: **Purchasing Pistols: Immaterial: Impeachment.** Evidence as to the purchase, by defendant's son, of two pistols several days before the homicide, was irrelevant and immaterial and should not have been admitted, there being nothing to connect it with the homicide, and it being conceded that the killing was done with a shotgun. And the evidence being immaterial, the witness was not subject to impeachment. *Ib.*

CRIMINAL LAW.—Continued.

15. ———: **Expert.** Testimony of an expert should be admitted only after a reasonably satisfactory showing that he is qualified to testify as an expert. *State v. Edwards*, 528.
16. **Remarks of Counsel: Abuse of Defendant and His Counsel: Reversible Error.** The prosecuting attorney, in his closing argument to the jury, said: "The attorney for the defendant has tampered with the witnesses; you know it, and I know it, and he ought to be convicted for it; and, too, the attorney for the defendant has attempted to buffalo and bulldoze this court and myself. . . . The defendant is a scoundrel and a perjurer, and ought to be convicted." Defendant objected to the remarks at the time they were made, and requested the court to instruct the jury to disregard them in considering of their verdict, but this the court failed to do, but simply requested the prosecuting attorney to keep within the record. *Held*, reversible error. *State v. Clapper*, 549.
17. **Confession: Presumed To Be Voluntary: Evidence.** A confession is presumed to be voluntary until the contrary is shown. And where defendant testifies that he made the confession under threats and promises, and witnesses for the State, who were present when the confession was made, testify that there were no threats or promises, the trial court is in a better position than is the appellate court to determine whether or not the confession was voluntarily made. *State v. Armstrong*, 554.
18. ———: **Made to Officer.** The fact that the confession is made to an officer or in the presence of an officer, after defendant has been arrested, is not of itself sufficient to warrant the court in excluding it. *Ib.*
19. **Instruction: Limiting Time: Harmless Error.** An instruction which limits the time of the commission of the offense to the year 1906, instead of three years prior to the time of the filing of the information, is an error in defendant's favor, of which he can not complain. *State v. Holden*, 581.
20. **Assault With Intent to Kill: Shooting At One, Hitting Another.** The gravamen of the offense of assault with intent to kill, is the intent with which the shot was fired. And where defendant is charged with felonious assault upon D., and the evidence shows that he shot at W. and the shot took effect upon D., he can not be convicted of assault with intent to kill D. *State v. Williamson*, 591.
21. **Burglary: Sufficiency of Evidence.** Evidence held sufficient to support a conviction of burglary. *State v. Howard*, 600.
22. **Burglary and Larceny: Conviction of Former.** Where defendant is charged with burglary and larceny, the jury may find him guilty of the burglary alone, although the evidence also abundantly establishes the larceny. *Ib.*
23. **Arrest: Warrant: Immaterial.** Whether or not the police officer had a warrant for defendant's arrest at the time he broke into defendant's house and discovered the stolen property in his possession, is immaterial in this prosecution of defendant for burglary and larceny. *Ib.*

CRIMINAL LAW.—Continued.

24. **Instruction: Time When Offense Committed: Error in Defendant's Favor.** An instruction which limits the time within which the jury might find the offense to have been committed, to the year 1906, instead of within three years prior to the date of the filing of the information, though erroneous, is an error in defendant's favor, of which he cannot complain. *State v. Davis*, 616.
25. **Information: Robbery: Time.** Time is not the essence of the offense of robbery. And an information charging this offense is not defective because it fails to specify the particular day of the month on which the alleged robbery was committed. *State v. Moore*, 624.
26. ———: ———: **Venue.** Where an information correctly lays the venue in the margin, it is not invalid because the venue is not stated in the body of the information. *Ib.*
27. ———: ———: **Fear of Injury: Nature of Instrument.** An information charging perjury is not invalid because it does not specify the nature of the instrument or the means by which the prosecuting witness was put in fear of immediate injury to his person. *Ib.*
28. **Perjury: Indictment: Pleading City Ordinances.** It is not necessary that an indictment for perjury charged to have been committed in a trial in a police court should set forth *in haec verba* the city ordinances creating the police court and authorizing the appointment of the clerk of the court and giving him authority to administer oaths, etc. A reference to such ordinances by their numbers and general tenor is sufficient. *State v. Dineen*, 628.
29. ———: **Materiality of Testimony: When Question of Law.** When there is no dispute as to what the party charged with perjury testified to upon an issue presented in a court of competent jurisdiction, the materiality of his testimony to the issue presented is purely a question of law for the court to determine. *Ib.*
30. ———: ———: **This Case.** In order to constitute perjury, the evidence charged to be false must have been material to the issue presented at the trial. On the trial, in a police court, of a party charged with disorderly conduct "on Jefferson avenue," defendant's testimony that the disorderly conduct occurred, not on Jefferson avenue, but on a vacant lot some forty feet distant from said avenue, was not material to the issue presented, and, even if false, did not constitute perjury. *Ib.*
31. **Notes of Testimony: Taken by Defendant on Habeas Corpus: Compelling Delivery.** It was error for the court to compel defendant's counsel to deliver to the prosecuting attorney for his inspection stenographer's notes of the testimony taken by defendant in a habeas corpus proceeding before the probate judge for the purpose of securing bail for defendant. *State v. Barnett and Baker*, 640.
32. **Deposition: Regular: Improper Examination of Defendant's Counsel.** Where the deposition of a witness for defendant is regularly taken, is read without objection, and no motion is

CRIMINAL LAW.—Continued.

filed to suppress it for any irregularity, the prosecuting attorney should not be permitted to conduct an examination of defendant's counsel for the purpose of showing that the witness's testimony was of little value because the State was not represented at the taking of the deposition. *State v. Barnett and Baker*, 640.

33. **Defendant as Witness: Character: Impeachment.** When a defendant offers himself as a witness, he is subject to impeachment in the same manner as any other witness, and for that purpose the State may attack his general reputation for morality. *Ib.*
34. **Instructions: Defendant's Jointly Indicted and Tried: General Objection.** Where defendants are jointly indicted and tried, an objection to the instructions given as not being all the law of the case is not sufficient to convict the court of error in failing to instruct that the jury might find one or both of the defendants guilty, or acquit one or both. Defendants should have requested such an instruction, or called the court's attention to its failure to instruct upon this particular feature of the case. *Ib.*
35. **Murder: Motive: No Instruction Necessary.** Where, in a prosecution for murder, the defense is justifiable homicide, an instruction as to motive is properly refused. *Ib.*
36. **Manslaughter: Erroneous Instruction.** An instruction is erroneous which tells the jury that if defendant killed deceased while in a violent passion suddenly aroused by a reasonable apprehension that deceased was about to kill him or inflict upon him some personal injury, he is guilty of manslaughter in the fourth degree. Apprehension of danger is applicable only to the theory of self-defense. *Ib.*
37. **Instruction: On Manslaughter: Conviction of Murder.** A defendant convicted of murder in the second degree has the right to complain of an erroneous instruction on manslaughter. *Ib.*
38. **Conspiracy: Indictment: Evidence.** It is not necessary, in order to the admission of evidence of a conspiracy between defendant and others, that such others be included in the indictment. *State v. Vaughan*, 663.
39. **Murder, First Degree: Escaping from Prison: Killing Guards.** Defendants who killed a penitentiary guard while they were attempting to escape from the penitentiary where they were lawfully confined, were guilty of murder in the first degree, and the court properly refused to submit to the jury instructions as to murder in the second degree. [Following *State v. Vaughan*, 200 Mo. 1.] *Ib.*
40. **Rape: Deaf Mute.** The taking of a deaf and dumb girl, seventeen years old, in intelligence and playful conduct like a child less than eleven years of age, to a hotel, and there registering her as the wife of defendant, and having her assigned to the same room and bed with defendant, and deflowering her during the night, is rape. *State v. Smith*, 695.

DEAF MUTE. See Witnesses, 5 and 6.

DEPOSITIONS.

1. **Contradicting Witness.** It is competent for plaintiff to read the deposition of a witness taken by plaintiff in another suit for the purpose of contradicting the evidence which the witness gives in behalf of defendants in the suit on trial. *Carp v. Insurance Co.*, 295.
2. **Regular: Improper Examination of Defendant's Counsel.** Where the deposition of a witness for defendant is regularly taken, is read without objection, and no motion is filed to suppress it for any irregularity, the prosecuting attorney should not be permitted to conduct an examination of defendant's counsel for the purpose of showing that the witness's testimony was of little value because the State was not represented at the taking of the deposition. *State v. Barnett and Baker*, 640.

DRAINAGE DISTRICT.

Civil Suit: Change of Venue. Under the provisions of section 818, Revised Statutes of 1899, providing that "a change of venue may be awarded in any civil suit," landowners, upon a compliance with the statutory requirements, are entitled to a change of venue in a proceeding brought in the circuit court for the formation and incorporation of a drainage district for the reclamation of swamp and overflowed lands. Such a proceeding is a "civil suit" within the meaning of those words. *State v. Riley*, 175.

EJECTMENT.

1. **Adverse Possession.** Adverse possession does not mean mere occupancy. The possession must be adverse to and in defiance of the true title; and although it be peaceable for twenty years, yet if it be not adverse to and inconsistent with the rights of the true owner, the occupant cannot claim the land by limitations. *Heckescher v. Cooper*, 278.
2. ———: **Claim of Ownership.** One cannot enter upon land supposing it to be Government land and occupy it for years and afterwards when he finds it to belong to plaintiff, set up a claim of adverse possession, and by asserting that he always claimed to be the owner and thought he had as good a title as any body else and in that belief and claim had occupied it for twenty years, defeat the title owner. *Ib.*
3. **Suit Against Landlord Alone.** Even though the plaintiffs in ejectment are shown to be the owners in equity of the land, they cannot recover possession if the suit is brought against the landlord alone and the evidence shows that a tenant who was not joined as a defendant was in possession at the time the suit was brought. *Houghton v. Pierce*, 723.
4. **Possession by Trustee: Adverse to Beneficiary: Limitation.** Where a trustee, to whom has been conveyed land for the sole use and benefit of another, enters into possession without other title than that conferred by the trust deed, the presumption is that he took possession as trustee by virtue of the deed, and not adversely to the beneficiary. Thereafter his possession could become adverse to the beneficiary, or after her death to her heirs, only by some unequivocal act or acts brought home to her knowledge, or after her death to their knowledge, showing that

EJECTMENT.—Continued.

he claimed the title in opposition to her or their title, or such an occupancy or user so open, notorious, and inconsistent with their rights that the law will authorize from such acts the presumption of such knowledge by them. *Houghton v. Pierce*, 723.

5. ———: **By Trustee's Wife Under Deed of Trust: Mortgagee in Possession.** The owner of the land in 1865 conveyed it in trust for the sole use of the owner's wife, and the trustee at once entered into possession. The trust deed was made subject to a prior deed of trust to secure a note for \$300, which was assigned by the payees by indorsement in blank, and this note was in possession of defendant, the trustee's wife, but the evidence does not show how or when she came into possession of it. The beneficiary of the trust deed died in 1872, and the trustee in 1899, and the trustee's wife claims title as assignee of the note and by adverse possession, but there is no evidence that she claimed possession adversely to her husband. *Held*, first, that possession by her cannot be considered adverse to her husband or to the beneficiary, without the most unequivocal assertion of claim of a separate estate hostile to both and brought home to their knowledge; *second*, as her husband, the trustee, took possession under the trust deed, the presumption is that her acts in receipting for the rents and paying the taxes were done in subordination to his legal title and right of possession, at least up to the time of his death in 1899; and, *third*, assuming (what is not shown) that the trustee's wife took the note indorsed in blank in good faith, for value, before maturity and without notice, and that the indorsement was proved, the presumption is that the rents which the trustee permitted her to receive were so received and applied by her to pay off the note, it being the duty of the trustee to protect the beneficiary's estate and pay off the prior lien out of the rents and profits. *Ib*.

ELECTIONS.

1. **Illegal Voting: Information: Invalid.** Information, set out in the statement, for illegal voting in election precincts in the city of St. Louis, *held*, invalid. *State v. Helderle*, 574.
2. ———: ———: **Uncertainty.** Where the information charges that defendant voted at the Fifth precinct and that he thereafter on the same day appeared at the Second precinct and did then and there before the judges of the Fifth precinct fraudulently apply for a ballot and feloniously cast said ballot and vote at said election, the information is too indefinite to base a conviction upon. *Ib*.
3. **Information: Fraudulent Registration.** An information set out in the statement, charging fraudulent registration in an election precinct, *held*, invalid, on the authority of *State v. Keating*, 202 Mo. 197. *State v. Walsh*, 605.
4. **Fraudulent Registration: Residence: Hearsay Evidence.** It was error to permit a witness for the State to testify, in rebuttal, over defendant's objection, to a conversation witness had, in the defendant's absence, with a lady at a certain number and street, in which conversation she stated that defendant lived there. This was the merest hearsay, and was all the more prejudicial because introduced in rebuttal. *Ib*.

ELECTIONS.—Continued.

5. ———: **Insufficiency of Evidence.** Evidence examined and held insufficient to support a conviction of fraudulent registration. *Ib.*

EMPLOYMENT. See *Contracts*, 9 to 17.**EQUITY.**

Sale of Minor's Lands: General Equity Jurisdiction. The circuit court did not by virtue of its general equity jurisdiction have authority to decree a sale of the minors' land for the mere purpose of reinvesting the proceeds. The jurisdiction of a court of equity to decree the sale of a minor's real estate must be built on something more substantial than a hope that a sale and reinvestment may result in financial advantages to the minor. *Heady v. Crouse*, 100.

EVIDENCE.

1. **Personal Injuries: Medical Services: No Evidence.** An instruction which authorizes plaintiff to recover in a personal injury case damages "for any expenses necessarily incurred by him for medicines, medical or surgical attention which the jury may believe from the evidence he has incurred by reason of said injuries and directly caused thereby" should not be given if there is no evidence on which to base it. And where the evidence on the subject consists of the testimony of two physicians, one of whom called on plaintiff once or twice, but did not receive any compensation and only stated that he usually charged two dollars a visit, and the other that he merely examined plaintiff for the purpose of testifying as an expert, and no showing was made of plaintiff's liability for such services, or the reasonable value thereof, and of plaintiff's testimony that he did not know the amount of the doctors' bills, there is no evidence on which to base the instruction. The instruction as it stands leaves it to the jury to estimate the damages that ought to be allowed, without any evidence to enlighten them, and is therefore error. *Gibler v. Terminal R. R. Assn.*, 208.
2. **Suit on Contract: Part Oral and Part Written.** Plaintiff contends that the original contract was verbal and entire and a part only was reduced to writing, and for that reason the rule that parol contemporaneous evidence cannot be introduced to vary the terms of the written instrument does not apply. *Held*, that the contention cannot be upheld in this case, for three reasons: *first*, such a contract must be pleaded, which was not done; *second*, the rule never applies except where the part of the contract which is reduced to writing shows upon its face that it is incomplete and that it does not purport to be a complete expression of the agreement; and, *third*, the plaintiff repeatedly stated in his testimony that the verbal contract was not made until after the written contract was executed. *Koons v. St. Louis Car Co.*, 227.
3. **Files of Court: Originals: Certified Copies.** The affidavit and information and other original instruments filed in a criminal cause in the circuit court, identified by one who speaks of his own knowledge of their authenticity, such as the prosecuting attorney, are evidence. The fact that the statute 203 Sup.—49.

EVIDENCE.—Continued.

(sec. 3135, R. S. 1899) makes "copies from the records, attested by the clerk, with the seal of the court annexed," evidence, is no reason why the original papers and records when fully identified should not be received as evidence. But a better method would be to call the clerk of the court and have him identify the files and records of which he is the lawful custodian. *Carp v. Insurance Co.*, 295.

4. **Agent: Insurance Company: Adjuster.** The fact that a certain person who authorized the posting of a reward for the capture of an incendiary was an agent of one of the defendant insurance companies cannot be established by the declaration of the man himself that he was the company's agent. And the fact that such person afterwards acted as adjuster for the company in adjusting the loss which grew out of the fire will not prove that he was its agent at the prior time when the reward was posted. *Ib.*
5. **Reputation: Based on Witness's Opinion.** The general reputation of a witness cannot be based on another witness's transactions with him; and an answer that the general reputation of a witness is bad, based on the dealings of the witness with him, should be stricken out. *Ib.*
6. **Malicious Prosecution: Arson: Posting Underwriter's Reward: Agent.** Plaintiff sues seven insurance companies for the malicious prosecution of himself for arson, which he alleges was brought about by them. Evidence was offered that soon after the fire a reward for the capture of the incendiary was posted by the Board of National Underwriters. *Held*, that the connection of that board with the defendants is not shown by the fact that the adjuster of one of the companies sent the notices and furnished the money with which the poster was paid, nor was the burden on the companies to show that they had no connection with the underwriters. *Ib.*
7. ———: **Loss of Business.** Plaintiff alleged that he had been greatly embarrassed and defamed and caused to suffer great anxiety of mind and lost much time and incurred and unnecessarily expended large sums of money in his defense against the malicious prosecution. *Held*, that evidence that prior to his arrest he had earned fifty dollars a month, that for the six months thereafter his time was occupied in trying to defend himself, and that he spent \$62 for depositions and \$150 for attorneys, was clearly within the allegations, and that it cannot be said he had no business whatever. *Ib.*
8. ———: **Pleadings in Another Suit: New Objection.** Appellants' objection, urged in this court for the first time, that petitions, answers, stipulations, judgments and verdicts in the suits on the insurance policies were incompetent because they were proceedings had after the institution of the criminal suit out of which grew this suit for malicious prosecution, cannot be considered on appeal. *Ib.*
9. ———: ———: **Identification.** Besides, such pleadings were competent as original papers, if identified by some witness who could testify of his own knowledge that they were the original files in that case; and the attorney for the plaintiff in that case may be such a witness. *Ib.*

EVIDENCE.—Continued.

10. ———: ———: **Subsequent Civil Proceedings: Probable Cause.** Where the purpose of encouraging or maintaining a criminal prosecution was to avoid a civil liability, the pleadings and proceedings in the civil suits against the defendants on their insurance policies, although begun subsequently to the criminal prosecution, are competent evidence in the suit for malicious prosecution to show that purpose and a lack of probable cause. *Ib.*
11. ———: ———: **Motive: Interest: Policies: Verdict.** The petitions, answers and replies filed in the civil suit on the policies issued by the defendant insurance companies are competent in the suit for malicious prosecution for arson against the same companies, to show the motive they had in the prosecution. The policies are also competent as tending to show the interest which the companies had in commencing and assisting in the continuance of the prosecution of plaintiff, although they covered stocks of goods owned by plaintiff's brother for whom plaintiff was a clerk. But the verdict and judgments are not competent evidence. *Ib.*
12. ———: **Due Diligence to Discover Pertinent Facts.** At the trial of a suit against insurance companies for having maliciously instituted a prosecution against plaintiff for arson, plaintiff was permitted to testify that Miss Williams, in the trial of a civil suit on the policy of one of the defendant insurance companies, had testified that she lived next door to plaintiff and while the fire bell was ringing the night of the fire (about midnight) she saw plaintiff go through his front gate towards the fire. This testimony was admitted on the theory that due diligence required defendants before instituting a prosecution against plaintiff to have made inquiries of his next door neighbors, and if they had done so Miss Williams would have informed them that the testimony of the State's witnesses that plaintiff was present at the fire immediately before the bell rang and was seen standing in the shadow of the building after the bell rang, was untrue. The information in the criminal prosecution was filed in May, 1902, and the case was tried in July, and Miss Williams' testimony was given in November in the trial of the civil suit. *Held*, that this testimony was hearsay, and was not admissible in chief under the rule laid down in *Stubbs v. Mullholland*, 168 Mo. 1. c. 76. Nor was the testimony of Miss Williams herself competent on any such theory — that is, to show that defendants were chargeable with a lack of due diligence in not having obtained it before the prosecution was begun. *Ib.*
13. ———: **Testimony of Witness at Criminal Trial.** It is competent for plaintiff in the suit for malicious prosecution, who was present at the trial of the criminal case and heard a witness testify, to state what was the witness's testimony at that time. *Ib.*
14. ———: **Agent's Effort to Get Testimony: Estopped to Deny Agency.** The testimony of a witness that an agent of the defendant insurance companies offered him money to get, and otherwise endeavored to get, information from his daughter for the prosecution of plaintiff, is competent. And the fact that such person testifies that he was not the agent of the defendants, but acted voluntarily, without compensation, does

EVIDENCE.—Continued.

not disprove his agency. If he busied himself to get information against plaintiff, and reported it to defendant's attorney and he and the prosecuting attorney in large measure acted upon his advice and instituted the prosecution, he is estopped to deny that he was defendant's agent. *Carp v. Insurance Co.*, 295.

15. ———: **Insurance Companies: Value of Goods Burned: Competency of Clerk.** A young woman who had for four years been a clerk in the store where the insured goods were burned, had helped to make an invoice of them shortly before the fire, and had had fifteen years experience as a clerk in like stores, is competent to testify as to the value of the stock of goods. And where she was a witness in the criminal trial, inquiries then of her as to the value of the goods and the amount of the invoice would have been obviously relevant, and hence she would likewise be competent to testify as to the same matters in the suit for that malicious prosecution. *Ib.*
16. ———: **Evidence of Plaintiff's Guilt.** A defendant in a case of malicious prosecution may show the guilt of the plaintiff by any evidence in his power, even though discovered after the prosecution began or after it ended, and notwithstanding plaintiff was acquitted. *Ib.*
17. ———: ———: **Plaintiff May Disprove His Guilt.** Where the defendants in the suit for malicious prosecution tender as a defense plaintiff's guilt of the criminal charge, it is competent for the plaintiff in rebuttal to disprove the evidence offered by the defense for that purpose—in this case, by showing that the witnesses for the defendants were either mistaken or had falsely sworn to his presence at the burning building at the time testified by them by evidence that he was at his home on the night of the fire and did not start to the fire until after the fire alarms were sounded. *Ib.*
18. ———: **Contradicting Witness: Deposition.** It is competent for plaintiff to read the deposition of a witness taken by plaintiff in another suit for the purpose of contradicting the evidence which the witness gives in behalf of defendants in the suit on trial. *Ib.*
19. ———: **General Reputation.** In a suit for malicious prosecution, plaintiff may (where the criminal charge was arson) prove his good reputation for business integrity and honesty in the community in which he resided prior to the commencement of the criminal prosecution. Likewise may defendant prove his bad reputation. But the evidence on that point must not be mere hearsay of instances of supposed wrongdoing, but must go to his general reputation in some particular community. *Ib.*
20. ———: **Elements.** Mental pain and anxiety caused by the disgrace accompanying the prosecution, the humiliation and danger from a prosecution for a grave criminal offense, the jeopardy in which plaintiff was placed, are elements of damages; and besides, disgrace is a relative term, varying in its effects upon different men, and dependent upon many conditions—all of which are matters for the jury. *Ib.*

EVIDENCE.—Continued.

21. ———: **Self-Serving Evidence.** Testimony of a witness that after plaintiff's arrest he went around hanging his head and acting as if he was in deep trouble and not in his right mind, is not proper to prove damages from anguish and the disgrace suffered. It opens too wide the door of self-serving testimony. *Ib.*
22. **Wealth of Defendant: Physician: Value of Services.** The court should not instruct the jury, on the issue of the measure of damages, to take into consideration the fact that defendant is a wealthy man. The physician, if entitled to recover at all for services rendered a patient, is entitled to recover the reasonable value of the services rendered, no more and no less, whether defendant be rich or poor. In such case, the jury have no concern with the question of defendant's ability to satisfy the judgment. *Morrell v. Lawrence*, 363.
23. ———: **When Admissible.** If the defendant should introduce evidence to show that plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plaintiff should have the right to show in rebuttal, if such were the fact, that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. To that extent, and under those conditions, the wealth of defendant may be shown. *Ib.*
24. ———: **Professional Services: General Reputation.** Where plaintiff sues for professional services rendered by him as a physician to defendant's son in New York, and alleges these services to be worth so much, and makes no claim for a loss from his usual income by reason of his absence from home in the service of defendant, testimony that he was a physician of good reputation in the community of his home, is not competent. It is competent to show that he is a physician of learning and skill, and that fact should be taken as an element in estimating the value of the services rendered, but his general reputation as a physician has no more to do with his case than his general reputation as a man. *Ib.*
25. ———: **Services Rendered Defendant's Son: Financial Ability of Son.** Where plaintiff sues defendant for professional services rendered his son, and knew in a general way the financial standing of both father and son, it is error to exclude evidence offered by defendant to show that the son was a man of considerable fortune and amply able to pay for the services rendered. Such evidence bears on the issue of the existence of defendant's implied promise to pay, that is, it would naturally militate against plaintiff's inference that defendant intended to pay for the services. *Ib.*
26. **Witness: Party to Contract: Other Party Dead.** The statute (sec. 4652, R. S. 1899) is an enabling, not a disqualifying, act. It does not disqualify any person to testify because of his interest in the contract, whether the other be dead or not. It disqualifies the surviving party only when one of the original parties to the contract is dead, and it does that because the other party is dead. But where one of them has died, his assignee of the claim sued on may testify as to what occurred in regard to the contract after his death, and the other party

EVIDENCE.—Continued.

may contradict that testimony and may give his own explanation of such post-mortem occurrences. [Overruling *Curd v. Brown*, 148 Mo. 95.] *Weiermueller v. Scullin*, 466.

27. **Threats: Uncommunicated: For What Purpose Admitted.** Uncommunicated threats made by deceased are admissible, not for the purpose of showing apprehension of danger, but as throwing light upon the acts and conduct of deceased at the time of the fatal difficulty, and as tending to show who was the aggressor. *State v. Edwards*, 528.
28. **Cross-Examination.** It was not error to ask defendant's son, on cross-examination, whether he did not say in the presence of another party, after having heard of the killing, "Well, it has happened." Great latitude should be allowed in the cross-examination of such a witness. *Ib.*
29. **Purchasing Pistols: Immaterial: Impeachment.** Evidence as to the purchase, by defendant's son, of two pistols several days before the homicide, was irrelevant and immaterial and should not have been admitted, there being nothing to connect it with the homicide, and it being conceded that the killing was done with a shotgun. And the evidence being immaterial, the witness was not subject to impeachment. *Ib.*
30. **Expert.** Testimony of an expert should be admitted only after a reasonably satisfactory showing that he is qualified to testify as an expert. *Ib.*
31. **Threats: Provocation: Reducing Grade of Crime.** The admission of threats by deceased against defendant is confined to that class of cases in which the evidence tends to show some act or conduct on the part of the deceased which threatens immediate injury to defendant, or which tends to prove that the homicide was committed in self-defense. And it was error to instruct the jury that such threats constituted an element of provocation which would reduce the homicide from murder to manslaughter. *Ib.*
32. **Witness: Party to Contract: Other Party Dead: Subsequent Transactions.** The statute does not exclude the living party from testifying where his evidence relates to transactions and conversations had with others to which the deceased was not a party and with which he had no connection. Where the suit is based on conversations had by decedent's assignee with defendant and admissions and promises by him, after decedent's death, defendant, the surviving party, may deny such admissions and explain the transaction, even though the claim grows out of a supposed debt due decedent and assigned to plaintiff. *Weiermueller v. Scullin*, 466.
33. **Confession: Presumed To Be Voluntary.** A confession is presumed to be voluntary until the contrary is shown. And where defendant testifies that he made the confession under threats and promises, and witnesses for the State, who were present when the confession was made, testify that there were no threats or promises, the trial court is in a better position than is the appellate court to determine whether or not the confession was voluntarily made. *State v. Armstrong*, 554.

EVIDENCE.—Continued.

34. ———: **Made to Officer.** The fact that the confession is made to an officer or in the presence of an officer, after defendant has been arrested, is not of itself sufficient to warrant the court in excluding it. *Ib.*
35. **Threats.** It was not error to admit in evidence threats made by defendant against deceased a week or two prior to the homicide. *State v. King*, 560.
36. **First Degree Murder: Sufficiency of Evidence.** Evidence held sufficient to justify the verdict finding defendant guilty of murder in the first degree. *Ib.*
37. **Gambling: Crap Table: Sufficiency of Evidence.** Evidence held sufficient to support the verdict finding defendant guilty of setting up and operating a crap table for the purpose of playing games of chance for money and property. *State v. Holden*, 581.
38. **Fraudulent Registration: Residence: Hearsay Evidence.** It was error to permit a witness for the State to testify, in rebuttal, over defendant's objection, to a conversation witness had, in defendant's absence, with a lady at a certain number and street, in which conversation she stated that defendant lived there. This was the merest hearsay, and was all the more prejudicial because introduced in rebuttal. *State v. Walsh*, 605.
39. ———: **Insufficiency of Evidence.** Evidence examined and held insufficient to support a conviction of fraudulent registration. *Ib.*
40. **Perjury: Materiality of Testimony: This Case.** In order to constitute perjury, the evidence charged to be false must have been material to the issue presented at the trial. On the trial, in a police court, of a party charged with disorderly conduct "on Jefferson avenue," defendant's testimony that the disorderly conduct occurred, not on Jefferson avenue, but on a vacant lot some forty feet distant from said avenue, was not material to the issue presented, and, even if false, did not constitute perjury. *State v. Dineen*, 628.
41. ———: ———: **Admission of Testimony.** The admission of testimony is not sufficient, in a prosecution for perjury, to prove that such testimony was material to the issue. *Ib.*
42. **Notes of Testimony: Taken by Defendant on Habeas Corpus: Compelling Delivery.** It was error for the court to compel defendant's counsel to deliver to the prosecuting attorney for his inspection stenographer's notes of the testimony taken by defendant in a habeas corpus proceeding before the probate judge for the purpose of securing bail for defendant. *State v. Barnett and Baker*, 640.
43. **Deposition: Regular: Improper Examination of Defendant's Counsel.** Where the deposition of a witness for defendant is regularly taken, is read without objection, and no motion is filed to suppress it for any irregularity, the prosecuting attorney should not be permitted to conduct an examination of defendant's counsel for the purpose of showing that the witness's testimony was of little value because the State was not represented at the taking of the deposition. *Ib.*

EVIDENCE.—Continued.

44. **Defendant as Witness: Character: Impeachment.** When a defendant offers himself as a witness, he is subject to impeachment in the same manner as any other witness, and for that purpose the State may attack his general reputation for morality. *State v. Barnett and Baker*, 640.
45. **Conspiracy: Indictment.** It is not necessary, in order to the admission of evidence of a conspiracy between defendant and others, that such others be included in the indictment. *State v. Vaughan*, 663.
46. **Burglary and Larceny: Sufficiency of Evidence.** Evidence in a prosecution for burglary and larceny *held* sufficient to justify the submission of the case to the jury. *State v. Toohey*, 674.
47. ———: **Proof of Other Crimes: Common Design: Evidence.** In a prosecution for burglary of and larceny from a certain Pullman car, it was not error to admit evidence tending to show that another car coupled to the former had been burglarized and articles stolen therefrom, the property taken from both cars having been sold at the same time and place by defendant and his coindicttee. The evidence tended to show a common design to burglarize both cars, and the two crimes were so closely related that proof of the one tended to establish the other. And, for the same reason, it was not error to permit the State to prove that defendant and his coindicttee were seen together on the afternoon of the day on which the crime was committed, in the cab of a locomotive engine, defendant breaking off pieces of brass from the engine, and his coindicttee picking them up. *Ib.*
48. ———: **Disposition of Stolen Property: Evidence.** No error was committed in permitting a witness for the State to testify that on the afternoon of the alleged burglary and larceny defendant and his coindicttee came to witness's junk shop and sold to him some of the articles alleged to have been stolen. Although the stolen property may have been partly or even exclusively in the possession of defendant's coindicttee at the time it was sold, yet defendant's presence was a circumstance tending to show his guilt. *Ib.*
49. **Witness: Deaf Mute.** A deaf and dumb girl, the prosecutrix in a trial of defendant for rape, is a competent witness for the State. *State v. Smith*, 695.
50. ———: **Expert: Bias.** The assistant superintendent of the Deaf and Dumb Institute where prosecutrix was educated, is peculiarly fitted to communicate with her by signs and to interpret her testimony to the jury; and whether or not he was unduly biased in her favor is a matter for the determination of the trial court, and if there is no ground for charging the court with a lack of proper discretion in the matter, the verdict will not be interfered with on that assignment. *Ib.*
51. **Impeachment.** Evidence which is admissible for any purpose cannot be excluded because it is inadmissible for other purposes. Evidence for plaintiff, in rebuttal, that a physician at the hospital (who was in the employ of defendant) pulled her up and down the hall in an effort to make her walk until one of the Sisters told him to take her to bed where she belonged, is incompetent as hearsay and as tending to prove no issue in the negligence case, but it is competent for impeach-

EVIDENCE.—Continued.

ing the physician who had testified that no one stopped him from trying to make plaintiff walk. If the defendant desired to have it limited to the purposes for which it was competent, it is its duty to ask an instruction so limiting it. *Sotelier v. Transit Co.*, 702.

52. **Personal Injuries: Medical Expenses Incurred.** It is the debt incurred by plaintiff for necessary medical attention, and not its payment, that establishes defendant's liability to pay in personal injury cases. It is unnecessary to allege payment. But where the petition charges that plaintiff "has expended and will be required to expend large sums of money for hospital fees, nurses, doctor's bills, and medicines," she is entitled to recover not only for those she has already paid, but the reasonable value of the services already necessarily rendered and not paid for, and also the reasonable value of services necessary in the future. *Ib.*
53. ———: ———: **In Future.** Evidence showing that plaintiff is a hopeless paralytic as the result of her injuries, and would constantly grow worse, was evidence to authorize a clause in the instruction directing the jury to include in their verdict expenditures which might be necessary for plaintiff to incur in the future. *Ib.*
54. ———: ———: ———: **Possibly Might.** An instruction which tells jury that they may allow plaintiff for any reasonable and necessary expenses for medical attention which she may incur in the future, does not mean that the jury may allow her for any expenses she "might possibly" incur. *Ib.*
55. ———: ———: ———: **Matter for Jury.** No positive evidence or opinion can be given as to what medical attention a plaintiff, whose injuries are permanent and consist of paralysis from the hips down, will require. The most that can be done in such a case is to show that the character of the injuries are such that plaintiff will probably need medical attention in the future, and then tell the jury that they may allow such sum therefor as the evidence shows would be just and reasonable. The jurors are as capable of fixing a proper award for such contemplated expenses as anyone. *Ib.*

EXCEPTIONS. See Bill of Exceptions.**EXECUTIONS.**

1. **Appellate Jurisdiction: Title to Real Estate: Homestead.** An adjudication, upon a motion to quash, that land levied upon under execution is defendant's homestead does not involve title to real estate, and therefore the appeal from a judgment adjudging that the land levied upon was defendant's homestead, is to the proper court of appeals. In determining whether or not homestead exists, the court begins with the necessary concessions that the title is vested in defendant; and a holding that homestead does or does not exist, does not divest that title. A sequence of a judgment that there is no homestead may be to divert defendant's title by sale under execution, but that would be an indirect, not a direct effect of the judgment. In arriving at that judgment, the court does not consider the question of title, but whether the statutory conditions are present which entitle the husband to homestead. *Snodgrass v. Copple*, 480.

EXECUTIONS.—Continued.

2. ———: Homestead. It is not a mere exemption, but an estate in lands, that vests in the head of a family, and it is not an exemption, but a life estate in lands, that vests in the widow at his death, as the statute declares; and as an adjudication of the existence of a homestead must necessarily determine the existence of that estate, and determine the inchoate right of the widow and children thereto, an appeal from a judgment on a motion to quash the execution on the ground that defendant had a homestead in the land levied upon, necessarily involves title to real estate, within the meaning of the constitutional provision governing appeals—as much so as would a suit in ejectment against the same defendant after sale of the land under execution, where the defense would be the existence of a homestead, and such suit would be appealable to this court alone. (Per Graves, J.) *Snodgrass v. Copple*, 480.
3. ———: ———: What is Title? "Title to real estate" means an estate for life or for years, as well as a fee simple interest. (Per GRAVES, J.) *Ib.*
4. ———: ———: Questions Involved. Not simply such questions as, is defendant the head of a family? are involved in the homestead inquiry, but the ultimate question is, does defendant have a homestead? And that means, does defendant have a vested estate in the lands? A homestead interest, as created by the statute, is an interest in real estate; and that being the fact, title to real estate is involved in any litigation that determines the existence of a homestead. (Per GRAVES, J.) *Ib.*

FORGERY.

Information: Promissory Note. An information, set out in the opinion, charging forgery of a promissory note, *held* sufficient. *State v. Paul*, 681.

GAMBLING.

1. **Crap Table: Sufficiency of Evidence.** Evidence held sufficient to support the verdict finding defendant guilty of setting up and operating a crap table for the purpose of playing games of chance for money and property. *State v. Holden*, 581.
2. ———: ———. Evidence held sufficient to support the verdict finding defendant guilty of setting up and operating a crap table for the purpose of playing games of chance for money and property. *State v. Davis*, 616.

GIFTS TO RELIGIOUS USES. See *Wills*, 1 to 5.

GUARDIAN AND CURATOR.

1. **Resulting Trust: Curator: Deed of Trust: Taking Title in Himself: Speculation on Ward's Money: Recital in Trustee's Deed.** A senior deed of trust on two pieces of property secured a loan thereon made by Mills and one made by the curator out of his ward's funds; a junior deed of trust on the same property secured the curator's individual loan as well as one made by him for his ward. *Held*, that there was no principle of natural equity or written law that denied to the curator the privilege of bidding at the foreclosure sale in his own right, to protect himself as well as the ward and Mills. If he bid more than the ward's debt, and treated the purchase as his own and accounted

GUARDIAN AND CURATOR.—Continued.

to the ward for her loan, by charging himself in gross for all money coming into his hands originally as the curator of her estate, and there is absent any increment of gain to him by way of speculation on his ward's money in the purchase of the property, a narrative in the trustee's deed to him that he paid the purchase price is presumptively true, and he did not take the property in trust for the ward. And this conclusion is fortified by the fact that in his final settlement the curator treats the loans made out of his ward's estate as if paid to him and as left in the corpus of the trust estate. *Bunel and Heffernan v. Nester*, 429.

2. ———: **Proof: Statement by Curator.** Disconnected parts of poorly remembered conversations between the deceased curator and the debtor whereby the curator is made to say on the date of the trustee's sale of the mortgaged property that he was bidding for his ward, are not sufficient to show that he took title for his ward—the rule being that where plaintiff relies for title on raising an implied trust, the proof should be so clear, unequivocal, cogent and impelling as to exclude every reasonable doubt from the chancellor's mind. *Ib.*
3. ———: ———: **This Case.** Giving force to the rule as to the character of proof required to establish an implied trust in property, and attending to the fact that both the trustee who sold the mortgaged property to the curator and the curator are dead, that the curator was solvent and possessed of large means and handled large sums, that the transaction in question was never questioned in his lifetime, that he treated the property purchased at the trustee's sale as his own and specifically disposed of it by will, and that the property was not specifically described in the ward's deed to plaintiffs, while other parcels of real estate were so described therein, it should be held that the proof was not sufficient to show that the curator bought the property at the trustee's sale for his ward. *Ib.*
4. ———: **Ward's Estate: Interest.** Under some circumstances interest should be charged to the curator on the money of his ward. But where the suit is to have a trust declared in her favor in property sold to him under a deed of trust given in part to secure a loan of her money and in part to secure a loan of his, and no claim is made that accrued interest was used towards paying a part of the purchase price, the pleadings are not in shape to authorize a consideration of the question. *Ib.*

HOMESTEAD. See Executions.

IMPLIED CONTRACTS. See Contracts, 9 to 17.

INDICTMENT AND INFORMATION.

1. **Invalid: Illegal Voting.** Information, set out in the statement, for illegal voting in election precincts in the city of St. Louis, held, invalid. *State v. Helderle*, 574.
2. **Illegal Voting: Uncertainty.** Where the information charges that defendant voted at the Fifth precinct and that he thereafter on the same day appeared at the Second precinct and did then and there before the judges of the Fifth precinct fraudulently apply for a ballot and feloniously cast said ballot and vote at said election, the information is too indefinite to base a conviction upon. *Ib.*

INDICTMENT AND INFORMATION.—Continued.

3. **One Count.** An information which first charges that defendant actually did the shooting, and then charges another party as accessory before the fact, and concludes, "against the peace and dignity of the State," contains but one count. *State v. Granger*, 586.
4. **Abbreviation.** An information is not defective merely because it employs the abbreviation "Jno." for the name John. *Ib.*
5. **Fraudulent Registration.** An information, set out in the statement, charging fraudulent registration in an election precinct, *held* invalid, on the authority of *State v. Keating*, 202 Mo. 197. *State v. Walsh*, 605.
6. **Robbery: Time.** Time is not the essence of the offense of robbery. And an information charging this offense is not defective because it fails to specify the particular day of the month on which the alleged robbery was committed. *State v. Moore*, 624.
7. ———: **Venue.** Where an information correctly lays the venue in the margin, it is not invalid because the venue is not stated in the body of the information. *Ib.*
8. ———: **Fear of Injury: Nature of Instrument.** An information charging robbery is not invalid because it does not specify the nature of the instrument or the means by which the prosecuting witness was put in fear of immediate injury to his person. *Ib.*
9. **Perjury: Pleading City Ordinances.** It is not necessary that an indictment for perjury charged to have been committed in a trial in a police court should set forth *in haec verba* the city ordinances creating the police court and authorizing the appointment of the clerk of the court and giving him authority to administer oaths, etc. A reference to such ordinances by their numbers and general tenor is sufficient. *State v. Dineen*, 628.
10. **First Degree Murder.** Information charging first degree murder, set out in the statement, *held* sufficient. *State v. Barnett and Baker*, 640.
11. **Forgery: Promissory Note.** An information, set out in the opinion, charging forgery of a promissory note, *held* sufficient. *State v. Paul*, 681.

INFANTS. See *Minors and Minors' Estates*.

INJUNCTION.

Appellate Jurisdiction. Where the suit is an injunction pure and simple and no constitutional question is involved, and the final decree from which the appeal is taken simply perpetuates the injunction against the defendants and adjudges costs against them, the Supreme Court has no jurisdiction of the appeal. *Moffatt v. Board of Trade*, 277.

INSANITY.

1. **Instruction: Excuse: Omission of Word "Always."** The instruction should tell the jury that "partial insanity does not

INSANITY.—Continued.

always excuse," and the word "always" should not be omitted. But where, upon a reading of the whole instruction from which that word is omitted, it seems impossible that the jury could have been misled by that inadvertent omission, it will not be held to be reversible error. *State v. Paulsgrove*, 193.

2. **Excuse for Crime.** One may be partially insane and yet responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the accused incapable at the time of committing the offense of distinguishing between the right and the wrong in reference to the particular act charged and proven against him. *Ib.*
3. **Instruction: Proof: Like any Other Fact: Insertion of Word "Not."** In one instruction given for the State the jury were told that "insanity is a fact which may not be proven like any other fact." Held, that the word "not" was incorrectly incorporated, but that was so plainly an inadvertence that, when all the instructions given are considered together, it cannot be seen that it had any prejudicial effect upon the rights of defendant. *Ib.*
4. **Question for Jury.** Where the instructions given on both sides fairly and fully submit to the jury the issue as to the sanity or insanity of the defendant and his criminal responsibility in the killing of his sweetheart, and there is evidence that tends to support the defense that he was not responsible for the homicide and ample evidence to the contrary, and no error was committed in the admission and exclusion of evidence, the issue is one for the jury to determine; and if their finding is free from bias and prejudice, the court will not interfere therewith. *Ib.*
5. **Instruction for Murder in Second Degree.** Where there is no evidence of just provocation and defendant is clearly guilty of murder in the first degree or excusable on the ground of insanity, the court should not direct the jury that if defendant in an excited and passionate frame of mind, without adequate cause or provocation, killed the deceased, they will find him guilty of murder in the second degree. No instruction on murder in the second degree should be given in such case. *Ib.*
6. **Instruction on Manslaughter.** An instruction that seeks to have the court instruct on manslaughter in the fourth degree if the defendant killed deceased because she refused to marry him, should be refused. Unless there is some evidence tending to show a lawful provocation for the homicide, no instruction for manslaughter in the fourth degree should be given. *Ib.*
7. **Instruction on Circumstantial Evidence.** Where the defense is insanity and all the evidence as to defendant's mental condition was open, direct and oral, and there was no circumstantial evidence about who committed the homicide, an instruction which seeks to submit to the jury the law as to a conviction upon circumstantial evidence would be misleading and should be refused. *Ib.*

INSTRUCTIONS.

1. **Insanity: Excuse: Omission of Word "Always."** The instruction should tell the jury that "partial insanity does not always excuse," and the word "always" should not be omitted. But where, upon a reading of the whole instruction from which that

INSTRUCTIONS.—Continued.

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6. **Refusing Correct Instructions.** Where the instructions given fully and fairly cover every issue in the case, a refusal of correct instructions asked by defendant, is not error. *Ib.*
7. **Negligence: Dangerous Obstruction: Ordinary Care.** Defendant's charge that an instruction allowed the plaintiff to recover if he stepped upon ice and slush on the sidewalk of the toll bridge, without requiring the jury to first find that such ice and slush formed a dangerous obstruction to pedestrians in passing over said sidewalk, is not well grounded in view of the fact that the instruction told the jury that "if they find from the evidence that the defendant did not exercise ordinary care in so maintaining said sidewalk with said ice and slush thereon and in permitting said ice and slush to be on said sidewalk," etc. *Gibler v. Terminal R. R. Assn.*, 208.
8. **General: How Cured.** An ambiguous or general term in one instruction may be explained by another instruction, and a partial view may thus be supplemented, provided the whole be consistent and harmonious. *Ib.*

INSTRUCTIONS.—Continued.

9. **Ordinary Care: Definition.** An instruction which defines "ordinary care" as applied to the keeper of a toll bridge as "such care as a prudent operator of a toll bridge would exercise" instead of "such care as a person of ordinary prudence would exercise," is not misleading or confusing, as both expressions mean practically the same thing, but it is nevertheless unhappily worded. *Ib.*
10. **Personal Injuries: Medical Services: No Evidence.** An instruction which authorizes plaintiff to recover in a personal injury case damages "for any expenses necessarily incurred by him for medicines, medical or surgical attention which the jury may believe from the evidence he has incurred by reason of said injuries and directly caused thereby" should not be given if there is no evidence on which to base it. And where the evidence on the subject consists of the testimony of two physicians, one of whom called on plaintiff once or twice, but did not receive any compensation and only stated that he usually charged two dollars a visit, and the other that he merely examined plaintiff for the purpose of testifying as an expert, and no showing was made of plaintiff's liability for such services, or the reasonable value thereof, and of plaintiff's testimony that he did not know the amount of the doctors' bills, there is no evidence on which to base the instruction. The instruction as it stands leaves it to the jury to estimate the damages that ought to be allowed, without any evidence to enlighten them, and is therefore error. *Ib.*
11. **Negligence: Scope of Agent's Authority.** An instruction setting forth the general acts of negligence charged, and correct as far as it goes, is not erroneous because it does not specifically require the jury to find that the negligent act of the motorman was within the scope of his authority. If defendant considered that a defect in the instruction, it was its duty to supply it by asking an instruction on the subject. *Wahl v. Transit Co.*, 261.
12. **Malicious Prosecution: False Testimony.** The court instructed the jury that "notwithstanding you may believe from the evidence that there was sufficient evidence produced at the trial of the criminal case against plaintiff as defined to you in other instructions, yet, if you further believe from the evidence that any material part of the evidence introduced against plaintiff in said criminal case was false, or was known to be false by defendants or either of them or their agents or servants, and that said false testimony was procured or connived at by defendants or either of them or their agents, then the jury would be warranted against such defendant or defendants, in finding that there was no probable cause for said prosecution, and that the same was malicious." *Held*, not to assume that there was false testimony given against plaintiff, nor to hold defendants liable for an unauthorized act of their agents, but was well enough. *Carp v. Insurance Co.*, 295.
13. ———: **Defendants' Connection Therewith.** Defendants' connection with the prosecution of the criminal case does not have to be proven by direct and positive evidence, but may be established by facts and circumstances from which it may be reasonably inferred. *Ib.*

INSTRUCTIONS.—Continued.

14. ———: **Acts of Agent: Advising Prosecution: Continuing, etc.** An instruction which directs the jury that if "defendants or either of them by their servants or agents wilfully, maliciously and without probable cause, did aid, advise or procure an information to be filed . . . or did wilfully, maliciously and without probable cause, aid, abet and advise the continuance of said prosecution after the filing of said information by their servants or agents," etc., does not hold the defendants liable for the acts of their servants regardless of their authority from defendants, and the use of the words "advise the continuance of said prosecution" was not improper when taken in connection with the words "aid, abet and advise," nor is the instruction otherwise erroneous. *Carp v. Insurance Co.*, 295.
15. ———: **Probable Cause: Malice: Advice of Counsel: Damages.** Instruction on probable cause, on the advice of counsel, on malice and on the measure of damages, actual and punitive, in a suit for malicious prosecution, are set out in the opinion, and *held*, to be correct. *Ib.*
16. ———: **At Instance of Prosecuting Attorney.** Where the evidence demonstrates that the prosecution against plaintiff was not begun by the prosecuting attorney of his own motion, but was instigated by defendants' agents and attorney, an instruction which tells the jury that their verdict must be for defendants if the prosecution was begun and maintained by the prosecuting attorney of his own motion, and without any request or procurement on the part of defendants, should not be given. Instructions should be based on the state of the case which the evidence justifies. (*Distinguishing White v. Shradski*, 36 Mo. App. 635, where said instruction upon a different state of facts was proper.) *Ib.*
17. ———: **Beginning Prosecution.** Defendants may be liable in a civil suit for malicious prosecution notwithstanding they did not begin the prosecution; they are liable if they maintained its continuance or aided and abetted it until its end, with malice and without probable cause. *Ib.*
18. ———: **Disagreement of Jury in Criminal Trial: Probable Cause.** The disagreement of the jury in the trial of the criminal case does not constitute reasonable grounds for a belief that defendant therein was guilty, and is not evidence of probable cause in the civil suit for malicious prosecution, and does not constitute a circumstance from which the jury may infer that such prosecution was with probable cause. *Ib.*
19. ———: **What Constitutes Beginning of Prosecution?** An instruction which undertakes to tell the jury that the information and not the affidavit filed by the agent of defendants was the beginning of the prosecution against plaintiff, is out of place and should not be given where the prosecution was induced by the affidavit and statements of defendants through the affiant and the advice of defendants' attorney and maintained by defendants until the prosecution ceased. *Ib.*
20. **Wealth of Defendant: Professional Services: Reasonable Value: Erroneous: Cured by Another.** In one instruction the jury were told that "in determining what is the reasonable value of the services rendered by the plaintiff" as a physician, they should take into consideration the ability of the defendant to

INSTRUCTIONS.—Continued.

- pay. *Held*, that this error was not cured by another instruction which told the jury that "the evidence touching the financial ability of defendant may be considered by the jury not to enhance the fees above a reasonable compensation, but solely to determine whether defendant is able to pay a fair and just and reasonable compensation for the services rendered." *Morrell v. Lawrence*, 363.
21. ———: ———: **Assuming Verdict for Plaintiff.** An instruction should not apparently assume that the jury is going to find for plaintiff and assess the value of the services in question, and be limited to directions to the jury as to what they are to take into consideration in making the assessment. The jury should be given to understand that before they reach the question of the amount of their award, they should determine the main issue of whether or not they will find for plaintiff, such as, "If the jury find for plaintiff, then in determining what is the reasonable value of the services rendered, they will take into consideration," etc. *Ib.*
 22. **Negligence: Contributory: Humanitarian Doctrine.** If the "humanitarian doctrine" applies to the case, as shown by the facts, contributory negligence is eliminated, and there is no necessity for incorporating into plaintiff's instruction designed to cover the whole case the question of whether or not the injured party was guilty of contributory negligence. *Johnson v. Railways*, 381.
 23. ———: ———: **Embraced in Defendant's Instruction.** Where plaintiff's given instruction designed to cover the whole case omits any direction to consider the question of contributory negligence, but specifically directs the jury to consider defendants' instructions as to the duties of the injured party, and in those instructions the doctrine of contributory negligence is fully set forth, it cannot be held that the case was unfairly committed to the jury, even if the question of contributory negligence is properly in the case. *Ib.*
 24. ———: **Failure, to Ring Bell: Burden.** Where one act of negligence charged was failure to ring the bell of the engine which struck plaintiff's child at the crossing, the fact that that failure was the cause of the child's death is essential to plaintiff's recovery for that act of negligence, but by the statute plaintiff is relieved of the burden of proving that fact, and the burden of disproving it is cast on defendant. Hence, an instruction for defendant which tells the jury "that before they can find for plaintiff they must believe that the plaintiff has proven the facts in support of her case by a preponderance of the evidence," is erroneous, because it not only places the burden of proving that fact on plaintiff, but requires her to prove it by the preponderance of the evidence. *McNulty v. Railroad*, 475.
 25. **Provoking Difficulty: No Evidence.** The giving of an instruction on the subject of provoking the difficulty, where, as in this case, there is no evidence upon which to base it, is reversible error. *State v. Edwards*, 528.
 26. **On Lower Grade of Offense: Erroneous.** Although a defendant cannot complain of a proper instruction covering a

INSTRUCTIONS.—Continued.

lower grade of offense than that of which the evidence shows him to be guilty, he has the right to challenge an instruction which erroneously declares the law as to such offense. *State v. Edwards*, 528.

27. **Threats: Provocation: Reducing Grade of Crime.** The admission of threats by deceased against defendant is confined to that class of cases in which the evidence tends to show some act or conduct on the part of the deceased which threatens immediate injury to defendant, or which tends to prove that the homicide was committed in self-defense. And it was error to instruct the jury that such threats constituted an element of provocation which would reduce the homicide from murder to manslaughter. *Ib.*
28. **On Self-Defense: Argumentative.** Where the court has, by its instructions, fully declared the law of self-defense, it is not error to refuse an instruction, requested by defendant, which is argumentative and theoretical, rather than a plain declaration of law. *Ib.*
29. **Self-Defense: Requested by Defendant.** Where, as in this case, the court has already fully instructed on the law of self-defense, there is no error in refusing an instruction, requested by defendant, embodying the same proposition. *State v. King*, 560.
30. **——: Evidence.** Under the facts as detailed by defendant himself, and by the State's witness, there was no call for an instruction on self-defense. *Ib.*
31. **Conspiracy: Assault: No Request.** There was no error in the court's failure to instruct as to the effect of a conspiracy followed by an assault upon defendant, for the reasons, first, there was no proof of such a conspiracy followed by an assault, and if there had been, the court's instruction on self-defense fully covered the law in that regard; and, second, the court's attention was not called to ~~his~~ failure to instruct on that point. *Ib.*
32. **Limiting Time: Harmless Error.** An instruction which limits the time of the commission of the offense to the year 1906, instead of three years prior to the time of the filing of the information, is an error in defendant's favor, of which he can not complain. *State v. Holden*, 581.
33. **Time When Offense Committed: Error in Defendant's Favor.** An instruction which limits the time within which the jury might find the offense to have been committed, to the year 1906, instead of within three years prior to the date of the filing of the information, though erroneous, is an error in defendant's favor, of which he cannot complain. *State v. Davis*, 616.
34. **Defendants Jointly Indicted and Tried: General Objection.** Where defendants are jointly indicted and tried, an objection to the instructions given as not being all the law of the case is not sufficient to convict the court of error in failing to instruct that the jury might find one or both of the defendants guilty, or acquit one or both. Defendants should have requested

INSTRUCTIONS.—Continued.

such an instruction, or called the court's attention to its failure to instruct upon this particular feature of the case. *State v. Barnett and Baker*, 640.

35. **Murder: Motive: No Instruction Necessary.** Where, in a prosecution for murder, the defense is justifiable homicide, an instruction as to motive is properly refused. *Ib.*
36. **Manslaughter: Erroneous Instruction.** An instruction is erroneous which tells the jury that if defendant killed deceased while in a violent passion suddenly aroused by a reasonable apprehension that deceased was about to kill him or inflict upon him some personal injury, he is guilty of manslaughter in the fourth degree. Apprehension of danger is applicable only to the theory of self-defense. *Ib.*
37. **On Manslaughter: Conviction of Murder.** A defendant convicted of murder in the second degree has the right to complain of an erroneous instruction on manslaughter. *Ib.*
38. **Murder, First Degree: Escaping from Prison: Killing Guards.** Defendants who killed a penitentiary guard while they were attempting to escape from the penitentiary where they were lawfully confined, were guilty of murder in the first degree, and the court properly refused to submit to the jury instructions as to murder in the second degree. [Following *State v. Vaughan*, 200 Mo. 1.] *State v. Vaughan*, 663.
39. **Assumption of Uncontroverted Fact: Loss of Wages.** The instructions may assume the truth of a proposition which is established by the undisputed evidence. And so, where the undisputed evidence was that plaintiff at the time of her injuries was receiving twelve dollars per month and her board, and there was no evidence that her services were not reasonably worth that, and there was no evidence that she had been able to perform any labor or earn any wages since the accident, it is not error to instruct the jury to allow her for loss of her wages. *Sotebier v. Transit Co.*, 702.
40. **Medical Attendance: In Future: Evidence.** Evidence showing that plaintiff is a hopeless paralytic as the result of her injuries and would constantly grow worse, was evidence to authorize a clause in the instruction directing the jury to include in their verdict expenditures which might be necessary for plaintiff to incur in the future. *Ib.*
41. ———: ———: **Possibly Might.** An instruction which tells the jury that they may allow plaintiff for any reasonable and necessary expenses for medical attention which she may incur in the future, does not mean that the jury may allow her for any expenses she "might possibly" incur. *Ib.*

INSURANCE.

1. **Malicious Prosecution: Arson: Posting Underwriter's Reward: Agent.** Plaintiff sues seven insurance companies for the malicious prosecution of himself for arson, which he alleges was brought about by them. Evidence was offered that

INSURANCE.—Continued.

soon after the fire a reward for the capture of the incendiary was posted by the Board of National Underwriters. *Held*, that the connection of that board with the defendants is not shown by the fact that the adjuster of one of the companies sent the notices and furnished the money with which the poster was paid, nor was the burden on the companies to show that they had no connection with the underwriters. *Carp v. Insurance Co.*, 295.

2. ———: **Motive: Interest: Policies: Verdict.** The petitions, answers and replies filed in the civil suit on the policies issued by the defendant insurance companies are competent in the suit for malicious prosecution for arson against the same companies, to show the motive they had in the prosecution. The policies are also competent as tending to show the interest which the companies had in commencing and assisting in the continuance of the prosecution of plaintiff, although they covered stocks of goods owned by plaintiff's brother for whom plaintiff was a clerk. But the verdict and judgments are not competent evidence. *Ib.*
3. ———: **Due Diligence to Discover Pertinent Facts.** At the trial of a suit against insurance companies for having maliciously instituted a prosecution against plaintiff for arson, plaintiff was permitted to testify that Miss Williams, in the trial of a civil suit on the policy of one of the defendant insurance companies, had testified that she lived next door to plaintiff and while the fire bell was ringing the night of the fire (about midnight) she saw plaintiff go through his front gate towards the fire. This testimony was admitted on the theory that due diligence required defendants before instituting a prosecution against plaintiff to have made inquiries of his next door neighbors, and if they had done so Miss Williams would have informed them that the testimony of the State's witnesses that plaintiff was present at the fire immediately before the bell rang and was seen standing in the shadow of the building after the bell rang, was untrue. The information in the criminal prosecution was filed in May, 1902, and the case was tried in July, and Miss Williams' testimony was given in November in the trial of the civil suit. *Held*, that this testimony was hearsay, and was not admissible in chief under the rule laid down in *Stubbs v. Mullholland*, 168 Mo. 1. c. 76. Nor was the testimony of Miss Williams herself competent on any such theory—that is, to show that defendants were chargeable with a lack of due diligence in not having obtained it before the prosecution was begun. *Ib.*
4. ———: **Agent's Effort to Get Testimony: Estopped to Deny Agency.** The testimony of a witness that an agent of the defendant insurance companies offered him money to get, and otherwise endeavored to get, information from his daughter for the prosecution of plaintiff, is competent. And the fact that such person testifies that he was not the agent of the defendants, but acted voluntarily, without compensation, does not disprove his agency. If he busied himself to get information against plaintiff, and reported it to defendant's attorney and he and the prosecuting attorney in large measure acted upon his advice and instituted the prosecution, he is estopped to deny that he was defendants' agent. *Ib.*

INSURANCE.—Continued.

5. ———: Insurance Companies: Value of Goods Burned: Competency of Clerk. A young woman who had for four years been a clerk in the store where the insured good were burned, had helped to make an invoice of them shortly before the fire, and had had fifteen years experience as a clerk in like stores, is competent to testify as to the value of the stock of goods. And where she was a witness in the criminal trial, inquiries then of her as to the value of the goods and the amount of the invoice would have been obviously relevant, and hence she would likewise be competent to testify as to the same matters in the suit for that malicious prosecution. *Ib.*
6. ———: Defendants' Connection Therewith: Demurrer to Evidence. Plaintiff was prosecuted for arson, and the case after a mistrial was voluntarily dismissed, and he sued the seven insurance companies which carried insurance on the goods burned, for having instigated the prosecution, and at the trial they asked for a peremptory instruction on the ground that the evidence did not show that they instigated or carried on the prosecution. The prosecuting attorney testified that he was not employed or requested by the defendants or their agents to file the affidavit; that the affidavit was made by one Musgrove, and that he filed the affidavit and information honestly believing plaintiff started the fire and that the evidence Musgrove gave him was sufficient to convict, and that he so stated at the time. The evidence further shows that the prosecuting attorney received his impressions and formed his conclusions of plaintiff's guilt from statements made to him by Musgrove and other witnesses secured by him; that before he filed the information, Musgrove had consulted an attorney and besought his assistance in the prosecution; that the affidavit was drawn by this attorney, and signed by Musgrove, at the attorney's request; that this attorney assisted in the prosecution from the commencement of the case until its dismissal, and that he was paid for his services by the accredited agents of defendants; that, while Musgrove denied that he was acting as the agent of the defendants in seeking evidence and urging the prosecution against plaintiff, they accepted those services and acted upon his advice and employed the attorney to prosecute plaintiff on the charge of arson; that the only parties interested in the prosecution were the defendants, who were seeking to avoid their policies on the goods burned; that a few days after the fire and before Musgrove became so active in his search for incriminating testimony against plaintiff, one Welch, an adjuster for all the defendants except one, was in the city of the fire, sent for plaintiff and his brother who owned the stock of goods, and assumed to represent defendants as adjuster and examined them as to the amount of the loss, and in the presence of a witness in the office of the local agent expressed the opinion that plaintiff had burned the store, and that he would send the United States marshal to arrest him, and that plaintiff ought to be in the penitentiary. *Held*, first, that defendants are estopped from denying that Musgrove was their agent; second, that the evidence was ample to show the connection of defendants with the instigation and carrying forward of the prosecution. *Ib.*
7. ———: ———: ———: Advice of Counsel: Agent's Disclosure of All Evidence. In this case it was for the jury to de-

INSURANCE.—Continued.

termine whether Musgrove, the agent of defendants, who swore to the affidavit and gave to the prosecuting attorney the information upon which the prosecution was based, disclosed all the facts within his knowledge, or which were easily ascertainable by him, touching plaintiff's connection with the fire, to the prosecuting attorney and defendants' counsel; and hence the court was not authorized to take the case from the jury under the rule that, where defendants truthfully disclose all the facts within their knowledge to competent counsel and are advised that there is probable cause for the prosecution, they are not liable. *Carp v. Insurance Co.*, 295.

JUDGMENTS.**Parole of Prisoner: After Appeal and Affirmance of Judgment.**

The circuit court, after an appeal by a convicted defendant and an affirmance of the judgment, and a direction by the Supreme Court that the sentence pronounced by the circuit court be executed and that the marshal arrest defendant and deliver him to the warden of the penitentiary, has no power to parole defendant. Nor does the circuit court, between the time of the affirmance of the judgment and the arrest of defendant, have power to parole him. The statute expressly provides that the Supreme Court, when a judgment of conviction is affirmed, shall direct that the sentence pronounced below shall be executed. *Ex parte Folster*, 687.

JURISDICTION.

1. **Real Estate: Sale of Minor's Interests.** A will devised land to a wife and the heirs of her body. A statute then in force authorized the circuit court to order a sale of a minor's real estate for investment in stocks and other real estate when it should appear to the court "after full examination upon the oath of disinterested and credible witnesses" to be for the benefit of the minor so to do, upon the petition of the infant's guardian and curator setting forth the facts deemed sufficient to render the sale desirable and necessary. The husband and wife as plaintiffs asked for a sale of the land of their six children, five of whom were minors, and the reinvestment of the proceeds in other land, the husband being appointed commissioner by the decree to make the sale. It does not appear from the decree that any necessity for the sale was suggested, nor any apprehension of imminent destruction of title or property, or that it was necessary for the support or maintenance of the minors, but the decree rests solely on the foundation that it would conduce to the interest of the minors to sell the land and reinvest the proceeds in other lands. *Held*, that the court had no jurisdiction, under the statute, to order the sale. *Heady v. Crouse*, 100.
2. ———: ———: **General Equity Jurisdiction.** Nor did the circuit court by virtue of its general equity jurisdiction have authority to decree a sale of the minors' land for the mere purpose of reinvesting the proceeds. The jurisdiction of a court of equity to decree the sale of a minor's real estate must be built on something more substantial than a hope that a sale and reinvestment may result in financial advantage to the minor. *Id.*

JURISDICTION.—Continued.

3. ———: ———: ———: Statute. Courts of equity have original jurisdiction over the estates of minors, but, conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and every thing whatsoever with the minor's estate, simply because he is a minor. The act to be valid must be based on some equitable principle. If the jurisdiction to sell the lands of infants for the mere purpose of investing in other property ever existed in chancery, there is no necessity for its exercise in Missouri, because for more than forty years power to do that is given by statute, under safeguards in the statute prescribed, and is now vested in the probate court. *Ib.*
4. Federal Jurisdiction: Negligence: Two Corporations: Fraudulent Joinder. The Federal court has no jurisdiction, on the theory of diverse citizenship, over a suit, by a citizen of this State for personal injuries received in this State, against two railroad companies, one a Missouri and the other a Kansas corporation, even though the foreign company allege, in its motion to transfer, that the cause of action as to it is a separable one from the one alleged against the domestic company (on whose track the injured party was working at the time he received the injuries inflicted by the foreign company's train) and that it was fraudulently joined as a defendant in an attempt to deprive it of its right to transfer the cause to the Federal court. *Johnson v. Railways*, 381.
5. ———: Assuming Jurisdiction After Appeal. Where the Federal court wrongfully assumed jurisdiction after judgment in the State court and after appeal, the appellate court will dispose of the appeal as if no transcript had been filed in the Federal court. *Ib.*

LANDS AND LAND TITLES.

1. To Jane and Heirs of Her Body: Child's Death Leaving Children. Where by will land was devised to Jane and the heirs of her body, and children were born to Jane, and afterwards the land was sold in pursuance to a decree of court brought by Jane and her husband against the children, and afterwards the children died before Jane, leaving children of their own born after the decree, the decree and the sale of the land thereunder did not affect the title of the grandchildren. Jane's children who died before she did were not her heirs; until her death their interests were contingent, and as they died first no title ever vested in them. The interests that would have gone to her children had they survived Jane, at her death became vested in the descendants of such deceased children, and hence the sale did not affect those descendants. *Heady v. Crouse*, 100.
2. Real Estate: Sale of Minor's Interests: Jurisdiction. A will devised land to a wife and the heirs of her body. A statute then in force authorized the circuit court to order a sale of a minor's real estate for investment in stocks and other real estate when it should appear to the court "after full examination upon the oath of disinterested and credible witnesses" to be for the benefit of the minor so to do, upon the petition of the infant's guardian and curator setting forth the facts deemed sufficient to render the sale desirable and necessary. The husband and wife as plaintiffs asked for a sale of the land

LANDS AND LAND TITLES.—Continued.

of their six children, five of whom were minors, and the reinvestment of the proceeds in other land, the husband being appointed commissioner by the decree to make the sale. It does not appear from the decree that any necessity for the sale was suggested, nor any apprehension of imminent destruction of title or property, or that it was necessary for the support or maintenance of the minors, but the decree rests solely on the foundation that it would conduce to the interest of the minors to sell the land and reinvest the proceeds in other lands. *Held*, that the court had no jurisdiction, under the statute, to order the sale. *Heady v. Crouse*, 100.

LARCENY. See Burglary.

LEASE.

1. **Power of Named Lessee to Acquire.** By an ordinance of the city of St. Louis several railroad companies therein named, "and their successors and assigns, are hereby severally authorized to sell, convey, or lease, if found desirable, their property, rights, privileges and franchises now owned and held, or herein granted, respectively, to any of the said companies named in this section, or to the St. Louis Transit Company, its successors or assigns," and "the said company and its successors and assigns so acquiring such property, rights, privileges and franchises, is hereby authorized to acquire, hold and enjoy the same during the term of this ordinance." The United Railways Company was not one of the companies named, but it acquired by purchase all the properties of those named, including the railway on which plaintiff was injured, and undertook to lease all the properties so acquired to the Transit Company. *Held*, that ordinance authorized a lease to the Transit Company. The city had authorized the Transit Company to acquire said railway by lease, and if the original owner could grant the lease to that company, so could a lawful purchaser do so. *Moorshead v. United Railways Co.*, 121.
2. ———: **Successors and Assigns.** The consent of the city to said lease is not dependent on the use of the words "successors and assigns" after the words "the Transit Company," but is to be found in the words of the ordinance which named the Transit Company itself as the lessee. *Ib.*
3. **By One Railway Company To Another: Good Faith.** If an agreement by which one street railway company transferred all its properties, privileges and franchises to another, was not entered into in good faith and for the purpose declared, but to defeat its creditors or to enable its properties and franchises to be held by such other for its benefit in a manner that would screen it from judgments and relieve it of responsibility, it will be held liable without regard to the contract. But such an issue would be for the jury unless the instrument itself, or facts in evidence, show the truth beyond dispute. *Ib.*
4. ———: **Agent: Partners.** The United Railways Company of St. Louis by agreement transferred to the Transit Company not only the right to operate its railways for a period of forty years, but every franchise held by it except the franchise to be a corporation, all its property, real, personal and mixed, all income derived from its bonds and stocks, and the

LEASE.—Continued.

money it had on hand at the date of the agreement and what it might receive afterwards by the sale of unusable property; and besides binding itself to operate the railways, the Transit Company bound itself to do various acts, such as keeping them in repair, making extensions and improvements and meeting the interest on bonded obligations, and to pay to the other company for the possession and use of the property during the stated period, the payments to be made at regular intervals and bearing all the characteristics of a fixed rent charge; and the contract provided for the reversion of the property to the grantor at the end of the term, and for a re-entry if the grantee defaulted in the performance of its covenants during the term. *Held*, that by the agreement the United Railways Company did not constitute the Transit Company its agent, nor did the agreement make them partners, but it was a lease. *Ib.*

5. ———: Goods, Etc. Goods, chattels and franchises may be leased as well as lands and tenements. *Ib.*
6. ———: Liability of Lessor for Lessee's Torts. Where the statute gives a street railway company express power to lease all of its properties to another street railway company, as the statute of this State does, the lessor is not liable in damages for injuries to a passenger resulting from the negligence of the lessee, unless such liability is expressly reserved in the statute. [*Distinguishing Markey v. Railroad*, 185 Mo. 348.] *Ib.*
7. Statutes: Time of Taking Effect: Revision Session: Lease. A statute with an emergency clause, approved June 19, 1899, authorizing one street railway company to lease all its properties to another, went into effect at once, although it was printed in the Revised Statutes of 1899 as a new section. *Ib.*
8. ———: Companies Already Organized. The act of June 19, 1899, by section 15 conferred on any existing street railway company which filed with the Secretary of State its acceptance of the act and paid the required fees, the power to lease its properties. *Ib.*
9. ———: ———: Acceptance Shown. Where plaintiff seeks to hold liable for her tortious injuries the street railway company which has leased its properties to another company, and for the purpose of fastening liability upon it introduces the lease in evidence, the burden is not on the company to show that it has filed with the Secretary of State its acceptance of the provisions of the act authorizing it to make the lease. In such case, in the absence of proof to the contrary, the presumption is that both companies have complied with the provisions of the statute. *Ib.*
10. To Railway Company: Torts: Liability of Lessor: Statute. When the lease of the franchises and railways of one street railway company to another is authorized by statute, the leasing company remains liable to third persons for the torts of the lessee, if the statute so says; and where the lease is not authorized by statute, the lease does not relieve the lessor of its public duties and responsibilities, but the lessor remains liable for the torts of the lessee. But where the statute does au-

LEASE.—Continued.

thorize the lease, without any reservation in the act of liability on the part of the lessor to third parties, for the torts of the lessee, the lessor is not liable for those torts. And where the statute expressly authorizes one street railway company "to sell, lease or dispose of by any other lawful contract, to any other street railway company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character and description," the lessor is not liable for the lessee's negligent injury of a passenger in the operation of a street car, and the General Assembly did not intend that it should be. The right to dispose of its corporate franchise being given to the grantor, it necessarily follows that it was not to be held liable for the torts of the grantee; and that conclusion is inevitable where the lessor is given the right to dispose of all its properties. *Moorshead v. United Railways Co.*, 121.

11. ———: ———: ———: **Public Policy.** The very highest policy of a State is its statutory law. But the question of the liability of the lessor for the torts of the lessee is not to be determined by public policy. It is not a question of public policy, but of legislative intention—of statutory construction. *Ib.*
12. **To Irresponsible Company: Liability of Lessor for Lessee's Torts.** The mischief which it is supposed by some courts that would result if leasing railway companies are not held responsible for the torts of the lessee, namely, that leases to irresponsible companies would be made for the purpose of evading liability, is met in this State by two answers: first, if that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible; and, second, our statutes require one-half of the capital stock of a street railway company to be subscribed and ten per cent of the subscription to be paid up in cash, and to that extent, at least, the lessees would have to start with assets. *Ib.*
13. **Incidents.** One of the incidents of a lease, unless there are covenants to the contrary, is that if the demised property (lands or chattels) is turned over to the lessee in good condition, the lessor is not thereafter liable to third parties for damages resulting from the negligent use of the property by the lessee; and where the statute empowers the lessee to operate the demised street railway, unless the power of control is reserved by the lessor in the lease, the operation will be without any interference by the lessor, and that necessarily means that the lessor is not answerable to a passenger negligently injured on a street car operated by the lessee — the injury being due to the sudden starting of that car too quickly after the passenger had boarded the car and thereby throwing her down. *Ib.*

LICENSE.

Automobile Act: Independent Sections: Speed. In a prosecution for a violation of section 2 of the Automobile Act of 1903, prohibiting the running of automobiles at a greater rate of speed than nine miles per hour, the validity of section 4 of said act, requiring operators of automobiles to obtain licenses, is not involved. *State v. Swagerty*, 517.

LIMITATIONS.**Ejectment: Possession by Trustee: Adverse to Beneficiary.**

Where a trustee, to whom has been conveyed land for the sole use and benefit of another, enters into possession without other title than that conferred by the trust deed, the presumption is that he took possession as trustee by virtue of the deed, and not adversely to the beneficiary. Thereafter his possession could become adverse to the beneficiary, or after her death to her heirs, only by some unéquivocal act or acts brought home to her knowledge, or after her death to their knowledge, showing that he claimed the title in opposition to her or their title, or such an occupancy or user so open, notorious, and inconsistent with their rights that the law will authorize from such acts the presumption of such knowledge by them. *Houghton v. Pierce*, 723.

MALICIOUS PROSECUTION.

1. **Arson: Posting Underwriter's Reward: Agent.** Plaintiff sues seven insurance companies for the malicious prosecution of himself for arson, which he alleges was brought about by them. Evidence was offered that soon after the fire a reward for the capture of the incendiary was posted by the Board of National Underwriters. *Held*, that the connection of that board with the defendants is not shown by the fact that the adjuster of one of the companies sent the notices and furnished the money with which the poster was paid, nor was the burden on the companies to show that they had no connection with the underwriters. *Carp v. Insurance Co.*, 295.
2. **Loss of Business.** Plaintiff alleged that he had been greatly embarrassed and defamed and caused to suffer great anxiety of mind and lost much time and incurred and unnecessarily expended large sums of money in his defense against the malicious prosecution. *Held*, that evidence that prior to his arrest he had earned fifty dollars a month, that for the six months thereafter his time was occupied in trying to defend himself, and that he spent \$62 for depositions and \$150 for attorneys, was clearly within the allegations, and that it cannot be said he had no business whatever. *Ib.*
3. **Pleadings in Another Suit: New Objection.** Appellants' objection, urged in this court for the first time, that petitions, answers, stipulations, judgments and verdicts in the suits on the insurance policies were incompetent because they were proceedings had after the institution of the criminal suit out of which grew this suit for malicious prosecution, cannot be considered on appeal. *Ib.*
4. ———: **Identification.** Besides, such pleadings were competent as original papers, if identified by some witness who could testify of his own knowledge that they were the original files in that case; and the attorney for the plaintiff in that case may be such a witness. *Ib.*
5. ———: **Subsequent Civil Proceedings: Probable Cause.** Where the purpose of encouraging or maintaining a criminal prosecution was to avoid a civil liability, the pleadings and proceedings in the civil suits against the defendants on their insurance policies, although begun subsequently to the criminal prosecution, are competent evidence in the suit for malicious prosecution to show that purpose and a lack of probable cause. *Ib.*

MALICIOUS PROSECUTION.—Continued.

6. ———: **Motive: Interest: Policies: Verdict.** The petitions, answers and replies filed in the civil suit on the policies issued by the defendant insurance companies are competent in the suit for malicious prosecution for arson against the same companies, to show the motive they had in the prosecution. The policies are also competent as tending to show the interest which the companies had in commencing and assisting in the continuance of the prosecution of plaintiff, although they covered stocks of goods owned by plaintiff's brother for whom plaintiff was a clerk. But the verdict and judgments are not competent evidence. *Carp v. Insurance Co.*, 295.
7. **Due Diligence to Discover Pertinent Facts.** At the trial of a suit against insurance companies for having maliciously instituted a prosecution against plaintiff for arson, plaintiff was permitted to testify that Miss Williams, in the trial of a civil suit on the policy of one of the defendant insurance companies, had testified that she lived next door to plaintiff and while the fire bell was ringing the night of the fire (about midnight) she saw plaintiff go through his front gate towards the fire. This testimony was admitted on the theory that due diligence required defendants before instituting a prosecution against plaintiff to have made inquiries of his next door neighbors, and if they had done so Miss Williams would have informed them that the testimony of the State's witnesses that plaintiff was present at the fire immediately before the bell rang and was seen standing in the shadow of the building after the bell rang, was untrue. The information in the criminal prosecution was filed in May, 1902, and the case was tried in July, and Miss Williams' testimony was given in November in the trial of the civil suit. *Held*, that this testimony was hearsay, and was not admissible in chief under the rule laid down in *Stubbs v. Mullholland*, 168 Mo. 1. c. 76. Nor was the testimony of Miss Williams herself competent on any such theory—that is, to show that defendants were chargeable with a lack of due diligence in not having obtained it before the prosecution was begun. *Ib.*
8. **Testimony of Witness at Criminal Trial.** It is competent for plaintiff in the suit for malicious prosecution, who was present at the trial of the criminal case and heard a witness testify, to state what was the witness's testimony at that time. *Ib.*
9. **Agent's Effort to Get Testimony: Estopped to Deny Agency.** The testimony of a witness that an agent of the defendant insurance companies offered him money to get, and otherwise endeavored to get, information from his daughter for the prosecution of plaintiff, is competent. And the fact that such person testifies that he was not the agent of the defendants, but acted voluntarily, without compensation, does not disprove his agency. If he busied himself to get information against plaintiff, and reported it to defendant's attorney and he and the prosecuting attorney in large measure acted upon his advice and instituted the prosecution, he is estopped to deny that he was defendant's agent. *Ib.*
10. **Insurance Companies: Value of Goods Burned: Competency of Clerk.** A young woman who had for four years been a clerk in the store where the insured goods were burned, had helped to make an invoice of them shortly before the fire, and had had fifteen years experience as a clerk in like

MALICIOUS PROSECUTION.—Continued.

stores, is competent to testify as to the value of the stock of goods. And where she was a witness in the criminal trial, inquiries then of her as to the value of the goods and the amount of the invoice would have been obviously relevant, and hence she would likewise be competent to testify as to the same matters in the suit for that malicious prosecution. *Ib.*

11. **Evidence of Plaintiff's Guilt.** A defendant in a case of malicious prosecution may show the guilt of the plaintiff by any evidence in his power, even though discovered after the prosecution began or after it ended, and notwithstanding plaintiff was acquitted. *Ib.*
12. ———: **Plaintiff May Disprove His Guilt.** Where the defendants in the suit for malicious prosecution tender as a defense plaintiff's guilt of the criminal charge it is competent for the plaintiff in rebuttal to disprove the evidence offered by the defense for that purpose—in this case, by showing that the witnesses for the defendants were either mistaken or had falsely sworn to his presence at the burning building at the time testified by them by evidence that he was at his home on the night of the fire and did not start to the fire until after the fire alarms were sounded. *Ib.*
13. **Contradicting Witness: Deposition.** It is competent for plaintiff to read the deposition of a witness taken by plaintiff in another suit for the purpose of contradicting the evidence which the witness gives in behalf of defendants in the suit on trial. *Ib.*
14. **General Reputation.** In a suit for malicious prosecution, plaintiff may (where the criminal charge was arson) prove his good reputation for business integrity and honesty in the community in which he resided prior to the commencement of the criminal prosecution. Likewise may defendant prove his bad reputation. But the evidence on that point must not be mere hearsay of instances of supposed wrongdoing, but must go to his general reputation in some particular community. *Ib.*
15. **Defendants' Connection Therewith: Demurrer to Evidence.** Plaintiff was prosecuted for arson, and the case after a mistrial was voluntarily dismissed, and he sued the seven insurance companies which carried insurance on the goods burned, for having instigated the prosecution, and at the trial they asked for a peremptory instruction on the ground that the evidence did not show that they instigated or carried on the prosecution. The prosecuting attorney testified that he was not employed or requested by the defendants or their agents to file the affidavit; that the affidavit was made by one Musgrove, and that he filed the affidavit and information honestly believing plaintiff started the fire and that the evidence Musgrove gave him was sufficient to convict, and that he so stated at the time. The evidence further shows that the prosecuting attorney received his impressions and formed his conclusions of plaintiff's guilt from statements made to him by Musgrove and other witnesses secured by him; that before he filed the information, Musgrove had consulted an attorney and besought his assistance in the prosecution; that the affidavit was drawn by this attorney, and signed by Musgrove,

MALICIOUS PROSECUTION.—Continued.

at the attorney's request; that this attorney assisted in the prosecution from the commencement of the case until its dismissal, and that he was paid for his services by the accredited agents of defendants; that, while Musgrove denied that he was acting as the agent of the defendants in seeking evidence and urging the prosecution against plaintiff, they accepted those services and acted upon his advice and employed the attorney to prosecute plaintiff on the charge of arson; that the only parties interested in the prosecution were the defendants, who were seeking to avoid their policies on the goods burned; that a few days after the fire and before Musgrove became so active in his search for incriminating testimony against plaintiff, one Welch, an adjuster for all the defendants except one, was in the city of the fire, sent for plaintiff and his brother who owned the stock of goods, and assumed to represent defendants as adjuster and examined them as to the amount of the loss, and in the presence of a witness in the office of the local agent expressed the opinion that plaintiff had burned the store, and that he would send the United States marshal to arrest him, and that plaintiff ought to be in the penitentiary. *Held*, first, that defendants are estopped from denying that Musgrove was their agent; *second*, that the evidence was ample to show the connection of defendants with the instigation and carrying forward of the prosecution. *Carp v. Insurance Co.*, 295.

16. ———: ———: **Advice of Counsel: Agent's Disclosure of All Evidence.** In this case it was for the jury to determine whether Musgrove, the agent of defendants, who swore to the affidavit and gave to the prosecuting attorney the information upon which the prosecution was based, disclosed all the facts within his knowledge, or which were easily ascertainable by him, touching plaintiff's connection with the fire, to the prosecuting attorney and defendants' counsel; and hence the court was not authorized to take the case from the jury under the rule that, where defendants truthfully disclose all the facts within their knowledge to competent counsel and are advised that there is probable cause for the prosecution, they are not liable. *Ib.*
17. **Probable Cause.** Probable cause is a mixed question of law and fact. Where the facts are undisputed, it is for the court to declare their legal effect; where they are disputed, it is for the jury to determine the question under proper instructions. And where there is testimony showing that no probable cause for the prosecution existed, or where there is evidence which impeaches defendants' testimony and tends to show it to be unreliable, the question is for the jury. The court should not assume the absolute truth of the testimony of defendants' witnesses. *Ib.*
18. ———: **Instruction: False Testimony.** The court instructed the jury that "notwithstanding you may believe from the evidence that there was sufficient evidence produced at the trial of the criminal case against plaintiff as defined to you in other instructions, yet, if you further believe from the evidence that any material part of the evidence introduced against plaintiff in said criminal case was false, or was known to be false by defendants or either of them or their agents or servants, and that said false testimony was procured or connived

MALICIOUS PROSECUTION.—Continued.

- at by defendants or either of them or their agents, then the jury would be warranted against such defendant or defendants, in finding that there was no probable cause for said prosecution, and that the same was malicious." *Held*, not to assume that there was false testimony given against plaintiff, nor to hold defendants liable for an unauthorized act of their agents, but was well enough. *Ib*.
19. **Defendants' Connection Therewith: Instruction.** Defendants' connection with the prosecution of the criminal case does not have to be proven by direct and positive evidence, but may be established by facts and circumstances from which it may be reasonably inferred. *Ib*.
20. **Instruction: Acts of Agent: Advising Prosecution: Continuing, etc.** An instruction which directs the jury that if "defendants or either of them by their servants or agents wilfully, maliciously and without probable cause, did aid, advise or procure an information to be filed . . . or did wilfully, maliciously and without probable cause, aid, abet and advise the continuance of said prosecution after the filing of said information by their servants or agents," etc., does not hold the defendants liable for the acts of their servants regardless of their authority from defendants, and the use of the words "advise the continuance of said prosecution" was not improper when taken in connection with the words "aid, abet and advise," nor is the instruction otherwise erroneous. *Ib*.
21. ———: **Probable Cause: Malice: Advice of Counsel: Damages.** Instruction on probable cause, on the advice of counsel, on malice and on the measure of damages, actual and punitive, in a suit for malicious prosecution, are set out in the opinion, and *held*, to be correct. *Ib*.
22. **At Instance of Prosecuting Attorney: Instruction.** Where the evidence demonstrates that the prosecution against plaintiff was not begun by the prosecuting attorney of his own motion, but was instigated by defendants' agents and attorney, an instruction which tells the jury that their verdict must be for defendants if the prosecution was begun and maintained by the prosecuting attorney of his own motion, and without any request or procurement on the part of defendants, should not be given. Instructions should be based on the state of the case which the evidence justifies. (*Distinguishing White v. Shradski*, 36 Mo. App. 635, where said instruction upon a different state of facts was proper.) *Ib*.
23. **Beginning Prosecution.** Defendants may be liable in a civil suit for malicious prosecution notwithstanding they did not begin the prosecution; they are liable if they maintained its continuance or aided and abetted it until its end, with malice and without probable cause. *Ib*.
24. **Disagreement of Jury in Criminal Trial: Probable Cause.** The disagreement of the jury in the trial of the criminal case does not constitute reasonable grounds for a belief that defendant therein was guilty, and is not evidence of probable cause in the civil suit for malicious prosecution, and does not constitute a circumstance from which the jury may infer that such prosecution was with probable cause. *Ib*.

MALICIOUS PROSECUTION.—Continued.

25. **What Constitutes Beginning of Prosecution?** An instruction which undertakes to tell the jury that the information and not the affidavit filed by the agent of defendants was the beginning of the prosecution against plaintiff, is out of place and should not be given where the prosecution was induced by the affidavit and statements of defendants through the affiant and the advice of defendants' attorney and maintained by defendants until the prosecution ceased. *Carp v. Insurance Co.*, 295.
26. **Excessive Verdict.** The amount of damages in a civil suit for malicious prosecution is largely a question for the jury, and their verdict should not be held by the appellate court to be excessive unless the court can say it was the result of prejudice, passion or malice. *Ib.*
27. ———: **Elements.** Mental pain and anxiety caused by the disgrace accompanying the prosecution, the humiliation and danger from a prosecution for a grave criminal offense, the jeopardy in which plaintiff was placed, are elements of damages; and besides, disgrace is a relative term, varying in its effects upon different men, and dependent upon many conditions—all of which are matters for the jury. *Ib.*
28. ———: **Self-Serving Evidence.** Testimony of a witness that after plaintiff's arrest he went around hanging his head and acting as if he was in deep trouble and not in his right mind, is not proper to prove damages from anguish and the disgrace suffered. It opens too wide the door of self-serving testimony. *Ib.*

MANDAMUS.

City: Trustee of Special Fund. Where the city as a trustee of a special fund has accumulated that fund and holds it, it may be restrained from using it for any other purpose, and compelled by *mandamus* to turn it over to its owner. And where a city undertook to collect water rentals from a waterworks plant which it had bought from plaintiff's assignor, and to pay for it in semiannual installments out of water rentals for private water service, it will be compelled to use that fund to pay the installments.

Held, by Woodson, J., in a separate opinion, that the obligation of the city to pay the hydrant rentals having been determined to be valid by prior decisions of this court, and that obligation being renewed in the compromise ordinance by which the city agreed to operate the plant itself and pay the company semiannual installments, those installments were but a continuation of the original obligation, and the city can be compelled by *mandamus* to pay them. *Held*, also, that *mandamus* will lie notwithstanding plaintiff's claim has not been reduced to judgment. The validity of the rentals was litigated in the prior suits. *State ex rel. v. City of Neosho*, 40.

MANSLAUGHTER.

1. **Erroneous Instruction: Apprehension of Danger.** An instruction is erroneous which tells the jury that if defendant killed deceased while in a violent passion suddenly aroused by a reasonable apprehension that deceased was about to kill him or inflict

MANSLAUGHTER.—Continued.

upon him some personal injury, he is guilty of manslaughter in the fourth degree. Apprehension of danger is applicable only to the theory of self-defense. *State v. Barnett and Baker*, 640.

2. **Instruction: On Manslaughter: Conviction of Murder.** A defendant convicted of murder in the second degree has the right to complain of an erroneous instruction on manslaughter. *Ib.*

MARRIAGE.

1. **Invalidity: Burden: Presumptions.** A second marriage, when shown to have been entered into according to the forms of law and to have been followed by the maintenance of marital relations, is clothed with every presumption of validity; and if its validity is drawn in question, the burden is on the attacking party, and that burden he must assume even to the proving of a negative. The presumption is not overcome by a showing that the deceased husband was previously married in due legal form to another woman, that she is still alive, that no divorce was ever granted to her knowledge, and that none was granted to him in the places where he was known to have had an established residence. The law indulges the presumption of innocence and rather than find the party guilty of bigamy will indulge the presumption of divorce. (*Distinguishing Snuffer v. Karr*, 197 Mo. 182, where it was admitted that there had been no dissolution of the first marriage.) *Johnson v. Railways*, 381.
2. ———: **Strained Construction.** Where the wife of the first marriage for nearly ten years lived with another man by whom she had two children, and for \$100 settled with defendants for the killing of the man for whose negligent death plaintiff as his second wife sues, and claimed no more, and upon the receipt of the money agreed to and did testify, and on hearing of the death of that man married the man with whom she had been living, the facts do not invite a strained construction against the validity of the second marriage. *Ib.*

MINORS AND MINORS' ESTATES.

1. **Real Estate: Sale of Minor's Interests: Jurisdiction.** A will devised land to a wife and the heirs of her body. A statute then in force authorized the circuit court to order a sale of a minor's real estate for investment in stocks and other real estate when it should appear to the court "after full examination upon the oath of disinterested and credible witnesses" to be for the benefit of the minor so to do, upon the petition of the infant's guardian and curator setting forth the facts deemed sufficient to render the sale desirable and necessary. The husband and wife as plaintiffs asked for a sale of the land of their six children, five of whom were minors, and the reinvestment of the proceeds in other land, the husband being appointed commissioner by the decree to make the sale. It does not appear from the decree that any necessity for the sale was suggested, nor any apprehension of imminent destruction of title or property, or that it was necessary for the support or

MINORS AND MINORS' ESTATES.—Continued.

maintenance of the minors, but the decree rests solely on the foundation that it would conduce to the interest of the minors to sell the land and reinvest the proceeds in other lands. *Held*, that the court had no jurisdiction, under the statute, to order the sale. *Heady v. Crouse*, 100.

2. ———: ———: **General Equity Jurisdiction.** Nor did the circuit court by virtue of its general equity jurisdiction have authority to decree a sale of the minors' land for the mere purpose of reinvesting the proceeds. The jurisdiction of a court of equity to decree the sale of a minor's real estate must be built on something more substantial than a hope that a sale and reinvestment may result in financial advantage to the minor. *Ib.*
3. ———: ———: ———: **Statute.** Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and every thing whatsoever with the minor's estate, simply because he is a minor. The act to be valid must be based on some equitable principle. If the jurisdiction to sell the lands of infants for the mere purpose of investing in other property ever existed in chancery, there is no necessity for its exercise in Missouri, because for more than forty years power to do that is given by statute, under safeguards in the statute prescribed, and is now vested in the probate court. *Ib.*
4. ———: ———: **Ratification.** Where the decree of the court made without jurisdiction created a lien on the land of the commissioner (their father) in favor of the minors whose real estate he was authorized to sell, to secure them in the purchase money, and he in after years divided all the land owned by him among them, giving them deeds of gift therefor, the acceptance of those deeds by the children will not be held to be a ratification of the sale of their lands, there being nothing in the deeds to indicate that they were given to compensate them for their interest in the lands sold by him. *Ib.*

See, also, **Guardian and Curator.**

MORTGAGES AND DEEDS OF TRUST.

1. **Resulting Trust: Curator: Deed of Trust: Taking Title in Himself: Speculation on Ward's Money: Recital in Trustee's Deed.** A senior deed of trust on two pieces of property secured a loan thereon made by Mills and one made by the curator out of his ward's funds; a junior deed of trust on the same property secured the curator's individual loan as well as one made by him for his ward. *Held*, that there was no principle of natural equity or written law that denied to the curator the privilege of bidding at the foreclosure sale in his own right, to protect himself as well as the ward and Mills. If he bid more than the ward's debt, and treated the purchase as his own and accounted to the ward for her loan, by charging himself in gross for all money coming into his hands originally as the curator of her estate, and there is absent any increment of gain to him by way of speculation on his ward's money in the purchase of the property, a narrative in the trustee's deed to him that he paid the purchase price is presumptively true, and he did not take the

MORTGAGES AND DEEDS OF TRUST.—Continued.

property in trust for the ward. And this conclusion is fortified by the fact that in his final settlement the curator treats the loans made out of his ward's estate as if paid to him and as left in the corpus of the trust estate. *Bunel and Heffernan v. Nester*, 429.

2. ———: **Proof: Statement by Curator.** Disconnected parts of poorly remembered conversations between the deceased curator and the debtor whereby the curator is made to say on the date of the trustee's sale of the mortgaged property that he was bidding for his ward, are not sufficient to show that he took title for his ward—the rule being that where plaintiff relies for title on raising an implied trust, the proof should be so clear, unequivocal, cogent and impelling as to exclude every reasonable doubt from the chancellor's mind. *Ib.*
3. ———: ———: **This Case.** Giving force to the rule as to the character of proof required to establish an implied trust in property, and attending to the fact that both the trustee who sold the mortgaged property to the curator and the curator are dead, that the curator was solvent and possessed of large means and handled large sums, that the transaction in question was never questioned in his lifetime, that he treated the property purchased at the trustee's sale as his own and specifically disposed of it by will, and that the property was not specifically described in the ward's deed to plaintiffs, while other parcels of real estate were so described therein, it should be held that the proof was not sufficient to show that the curator bought the property at the trustee's sale for his ward. *Ib.*
4. **Ejectment: Adverse Possession: By Trustee's Wife Under Deed of Trust: Mortgagee in Possession.** The owner of the land in 1865 conveyed it in trust for the sole use of the owner's wife, and the trustee at once entered into possession. The trust deed was made subject to a prior deed of trust to secure a note for \$300, which was assigned by the payees by indorsement in blank, and this note was in possession of defendant, the trustee's wife, but the evidence does not show how or when she came into possession of it. The beneficiary of the trust deed died in 1872, and the trustee in 1899, and the trustee's wife claims title as assignee of the note and by adverse possession, but there is no evidence that she claimed possession adversely to her husband. *Held*, first, that possession by her cannot be considered adverse to her husband or to the beneficiary, without the most unequivocal assertion of claim of a separate estate hostile to both and brought home to their knowledge; *second*, as her husband, the trustee, took possession under the trust deed, the presumption is that her acts in receipting for the rents and paying the taxes were done in subordination to his legal title and right of possession, at least up to the time of his death in 1899; and, *third*, assuming (what is not shown) that the trustee's wife took the note indorsed in blank in good faith, for value, before maturity and without notice, and that the indorsement was proved, the presumption is that the rents which the trustee permitted her to receive were so received and applied by her to pay off the note, it being the duty of the trustee to protect the beneficiary's estate and pay off the prior lien out of the rents and profits. *Houghton v. Pierce*, 723.

MOTION FOR NEW TRIAL. See *New Trial*.

MOTIVE.

Murder: No Instruction Necessary. Where, in a prosecution for murder, the defense is justifiable homicide, an instruction as to motive is properly refused. *State v. Barnett and Baker*, 640.

NEGLIGENCE.

1. **Lease: Incidents: Liability of Lessor and Lessee.** One of the incidents of a lease, unless there are covenants to the contrary, is that if the demised property (lands or chattels) is turned over to the lessee in good condition, the lessor is not thereafter liable to third parties for damages resulting from the negligent use of the property by the lessee; and where the statute empowers the lessee to operate the demised street railway, unless the power of control is reserved by the lessor in the lease, the operation will be without any interference by the lessor, and that necessarily means that the lessor is not answerable to a passenger negligently injured on a street car operated by the lessee—the injury being due to the sudden starting of that car too quickly after the passenger had boarded the car and thereby throwing her down. *Moorshead v. United Railways Co.*, 121.
2. **Toll Bridge: Liability to Pedestrian.** A company which operates a public toll bridge across the Mississippi river is not a common carrier. It must keep the bridge in a reasonably safe condition for travel, and is liable to a pedestrian for negligence only for a failure to do that. But the ordinary care which it must use is care proportionate to the danger to be apprehended. *Gibler v. Terminal R. R. Assn.*, 208.
3. **———: ———: Contributory Negligence: Reasonable Care: Question for Jury: Demurrer to Evidence.** A snow less than an inch and a half deep fell on December 8th. The next morning the snow on the street car tracks on the bridge and the wagon driveway was swept off and piled on the sidewalks of the bridge, and this was the condition when plaintiff crossed the bridge on the 10th. except that some of the snow had melted and formed slush, part of which had turned into ice. That evening when plaintiff attempted to walk across, he kept to the driveway from which defendant had partially removed the snow, and walked thereon until it was difficult, if not impossible, for him to proceed further on the driveway because of the blockade of vehicles near the toll-collector's office. He turned towards the sidewalk to avoid a team driven towards him and was then compelled to step on the sidewalk to avoid a buggy driven in his direction. After getting on the sidewalk he made a step or two forward, but on account of the ice and slush accumulated there he slipped and fell, and his leg was broken. The bridge was 4,200 feet long, 3,168 passengers crossed it that day, and after it quit snowing on December 8th eighty men were put to work to remove the snow, and one witness testified that one side of the bridge could be easily cleaned in a half day, yet the men were still at work removing the snow and ice at the time plaintiff was injured, which was two full days after the snow fell. *Held*, that, the effect of the demurrer being to admit as true all material facts shown by the evidence, the question of plaintiff's contributory negligence was one in regard to which reasonable minds might differ, and was therefore properly submitted to the jury, as was also the question of whether the bridge was reasonably safe for persons passing over it. *Ib.*

NEGLIGENCE.—Continued.

4. **Motorman: Scope of Duties: Waving at and Frightening Child: Allegations.** A motorman in control of and operating a street car in a public street has authority to do all acts reasonably necessary and incidental to the proper discharge of his duties, among which is the duty to so operate the car as not to injure pedestrians and children on the street who may assume positions of danger, and to warn persons away from places of danger, and if he negligently fails to do that and as a result pedestrians are injured by the car, it is the negligent act of his employer; and an allegation that defendant was operating a car in charge of its motorman on a named public street, and that at a certain point the motorman negligently left his post on the car and negligently waved to plaintiff, who was a child of tender years playing on a pile of loose earth beside the track, and thereby so frightened him as to cause him to start to run across the track in front of the car, are sufficient to show that the act of the motorman was within the scope of his employment. *Wahl v. Transit Co.*, 261.
5. ———: ———: ———: **Evidence.** A child was standing within a foot and a half of the track when the car was yet ten or fifteen feet from him. According to plaintiff's evidence the motorman stepped from his place in front of the car, and with his right foot upon the step of the front platform reached out with his arm to wave or frighten the child away, whereupon the child started to run across the track in front of the car and was struck by it. *Held*, that, ordinary care would have suggested to the motorman, considering the tender years of the child, to slow down his car and stop it if necessary until he was assured of the child's safety, and the act was done in his master's service, and came within the scope of his employment, and a verdict finding that it was negligent is upheld. *Ib.*
6. **Contributory: Wantonness.** Where the injured party was in a place where he had a right to be and in a place where the defendant corporation had the right to expect him to be, and that place is one of imminent peril, the "humanitarian doctrine" applies, and it is not necessary either to allege or prove wantonness, recklessness or wilfulness; and even if contributory negligence is shown, plaintiff will not be denied the right to recover simply because no wantonness is shown. *Johnson v. Railways*, 381.
7. ———: **Ordinance Speed: Signal: Question for Jury.** Where the ordinance fixes a maximum speed for trains of five miles per hour and requires the bell of each locomotive engine to be rung continuously within the city limits, ordinary care does not require a trackman at work on the track to continuously look for an approaching train whose arrival is expected, but he has the right to work on and assume that those in charge of the train will obey the ordinances; and if there is evidence that they disregarded the ordinances in both respects, and evidence to the contrary, the court will not declare as a matter of law he was guilty of contributory negligence, but that question is one for the jury. *Ib.*
8. **Contributory: Humanitarian Doctrine: Instruction.** If the "humanitarian doctrine" applies to the case, as shown by the facts, contributory negligence is eliminated, and there is no necessity for incorporating into plaintiff's instruction designed to cover the whole case the question of whether or not the injured party was guilty of contributory negligence. *Ib.*

NEGLIGENCE.—Continued.

9. ———: **Embraced in Defendant's Instruction.** Where plaintiff's given instruction designed to cover the whole case omits any direction to consider the question of contributory negligence, but specifically directs the jury to consider defendants' instructions as to the duties of the injured party, and in those instructions the doctrine of contributory negligence is fully set forth, it cannot be held that the case was unfairly committed to the jury, even if the question of contributory negligence is properly in the case. *Johnson v. Railways*, 381.
10. **Two Defendants: Joint Control of Train: New Point.** Where the point was not raised in the original brief, or in the trial court, that the evidence does not support the allegation that the train which inflicted the injuries on deceased was under the control of both defendants, the point was not timely raised. *Ib.*
11. ———: ———: **Traffic Arrangements.** Where the traffic arrangement introduced in evidence amounts to a leasing of the tracks of the Missouri corporation to the foreign corporation whose train inflicted the injury, they are jointly liable. And if the servants in charge of the train were required to await the signals of the servant of the Missouri company before the train could proceed over its tracks, that is evidence that the train was under the joint control of both companies. *Ib.*
12. **Failure to Ring Bell: Burden: Instruction.** Where one act of negligence charged was failure to ring the bell of the engine which struck plaintiff's child at the crossing, the fact that that failure was the cause of the child's death is essential to plaintiff's recovery for that act of negligence, but by the statute plaintiff is relieved of the burden of proving that fact, and the burden of disproving it is cast on defendant. Hence, an instruction for defendant which tells the jury "that before they can find for plaintiff they must believe that the plaintiff has proven the facts in support of her case by a preponderance of the evidence," is erroneous, because it not only places the burden of proving that fact on plaintiff, but requires her to prove it by the preponderance of the evidence. *McNulty v. Railroad*, 475.
13. ———: **Demurrer to Evidence.** Where there is evidence tending to prove that the bell was not rung, and plaintiff's suit for damages is based on defendant's failure to ring the bell, no demurrer to the evidence should be sustained. *Ib.*
14. **Instructions: Assumption of Uncontroverted Fact: Loss of Wages.** The instructions may assume the truth of a proposition which is established by the undisputed evidence. And so where the undisputed evidence was that plaintiff at the time of her injuries was receiving twelve dollars per month and her board, and there was no evidence that her services were not reasonably worth that, and there was no evidence that she had been able to perform any labor or earn any wages since the accident, it is not error to instruct the jury to allow her for loss of her wages. *Sotabier v. Transit Co.*, 702.
15. ———: **Medical Expenses Incurred.** It is the debt incurred by plaintiff for necessary medical attention, and not its payment, that establishes defendant's liability to pay in personal injury

NEGLIGENCE.—Continued.

cases. It is unnecessary to allege payment. But where the petition charges that plaintiff "has expended and will be required to expend large sums of money for hospital fees, nurses, doctor's bills, and medicines," she is entitled to recover not only for those she has already paid, but the reasonable value of the services already necessarily rendered and not paid for, and also the reasonable value of services necessary in the future. *Ib.*

16. ———: ———: **In Future: Evidence.** Evidence showing that plaintiff is a hopeless paralytic as the result of her injuries, and would constantly grow worse, was evidence to authorize a clause in the instruction directing the jury to include in their verdict expenditures which might be necessary for plaintiff to incur in the future. *Ib.*
17. ———: ———: ———: **Possibly Might.** An instruction which tells the jury that they may allow plaintiff for any reasonable and necessary expenses for medical attention which she may incur in the future, does not mean that the jury may allow her for any expenses she "might possibly" incur. *Ib.*
18. ———: ———: ———: **Matter for Jury.** No positive evidence or opinion can be given as to what medical attention a plaintiff, whose injuries are permanent and consist of paralysis from the hips down, will require. The most that can be done in such a case is to show that the character of the injuries are such that plaintiff will probably need medical attention in the future, and then tell the jury that they may allow such sum therefor as the evidence shows would be just and reasonable. The jurors are as capable of fixing a proper award for such contemplated expenses as anyone. *Ib.*

NEW TRIAL.

1. **Remarks of Counsel: Not in Motion for New Trial.** Improper remarks of counsel not called to the court's attention in the motion for new trial can not be considered on appeal. *State v. Clapper, 549.*
2. **Appeals: Motion for New Trial: Indefinite Assignment.** An assignment in the motion for new trial that the court erred in admitting illegal and irrelevant testimony, is not sufficiently definite; and the appellate court will not go through the record to discover such testimony. *State v. Holden, 581.*
3. ———: **Overruling Motion for New Trial: No Exception.** Where the record shows that appellant failed to preserve by bill of exceptions any exception to the action of the court in overruling the motion for new trial, there is nothing for the appellate court to review except the record proper. *State v. Libby, 596.*

OWNERSHIP.

- Taxbill: Assignment.** Where defendants assert by way of new matter that plaintiff before the beginning of the suit assigned and delivered the taxbill sued on to a brokerage company, they are not in a position to insist on a general denial to the effect that he was never the owner of the taxbill, for if he assigned it he owned it, and an allegation that he assigned it is inconsistent with an assertion that he never owned it. *Dickey v. Porter, 1.*

PAROLE.

1. **Of Prisoner: After Appeal and Affirmance of Judgment.** The circuit court, after an appeal by a convicted defendant and an affirmance of the judgment, and a direction by the Supreme Court that the sentence pronounced by the circuit court be executed and that the marshal arrest defendant and deliver him to the warden of the penitentiary, has no power to parole defendant. Nor does the circuit court, between the time of the affirmance of the judgment and the arrest of defendant, have power to parole him. The statute expressly provides that the Supreme Court, when a judgment of conviction is affirmed, shall direct that the sentence pronounced below shall be executed. *Ex parte Folster*, 687.
2. ———: ———: **Repeal by Implication: Appeal Pending.** Section 2827, Revised Statutes 1899, providing that no parole shall be granted in any case while an appeal is pending, did not by implication confer power on the circuit court to grant a parole after affirmance of the judgment, when the appeal is no longer pending. That provision did not, by implication, repeal the provisions of section 2705 which expressly requires the Supreme Court, when a judgment is affirmed, to direct that the judgment of the trial court be executed. *Ib.*

PARTIES TO ACTIONS.

1. **Pledge: Real Party in Interest: Taxbill.** Where the owner of a taxbill has pledged it as collateral security for the payment of a note of less amount he owes a bank, he still has such an interest in it as entitles him to bring suit thereon to preserve and enforce the lien of the taxbill. Notwithstanding the pledge, the title does not pass to the pledgee, but still remains in the pledgor, subject to the pledgee's lien—just as in the case of a mortgage. *Dickey v. Porter*, 1.
2. ———: ———: ———: **Equity: Code.** The General Assembly, in creating the Code, and in providing for but one form of action, and in providing that that shall be prosecuted in the name of the real party in interest, in substance adopted the equity rule which had theretofore prevailed, that the assignee of an assigned instrument might sue in his own name, he being the real party in interest, and that the pledgor of a pledged instrument being one of the real parties in interest (and being especially interested, for instance, in preserving and enforcing the lien of the pledged special taxbill) should at least be one of the parties plaintiff. *Ib.*
3. ———: ———: ———: **Defect of Parties: Not Raised by Answer.** It is competent for both the pledgor and pledgee to join in a suit to preserve and enforce the lien of a special taxbill, but if the suit is brought by the pledgor alone, and the defect of parties does not appear on the face of the petition, it can be raised only by answer. *Ib.*
4. ———: ———: ———: **Payment.** If between the time the suit is brought by both the pledgor and pledgee and the trial, the debt, to secure which the pledged special taxbill was held by the pledgee as collateral security, is paid, the pledgee is no longer a necessary party to an action to enforce the lien of the special taxbill, or to recover a judgment thereon if the lien has expired, and if the attention of the court is

PARTIES TO ACTIONS.—Continued.

called to that fact the name of the pledgee should be stricken out. *Ib.*

5. ———: ———: ———: Pledgee Alone: Trustee. The pledgee of a lien (for instance, a special taxbill) may bring suit in his own name to enforce the lien, but the extent of his recovery for himself will be the amount of the debt the pledgor owes him, and he will be a trustee for the pledgor for the overplus. But that does not mean that the pledgor, where he is the real party in interest, may not also bring the suit either alone, or by joining with the pledgee as plaintiff. *Ib.*
6. **Payment to Wrong Party.** Under the charter of Kansas City, the owners of abutting property against which a special taxbill has been issued in payment of a sewer, can avoid all danger of paying the amount of the taxbill to the wrong party by paying it to the city treasurer. *Ib.*
7. **Ejectment: Suit Against Landlord Alone.** Even though the plaintiffs in ejectment are shown to be the owners in equity of the land, they cannot recover possession if the suit is brought against the landlord alone and the evidence shows that a tenant who was not joined as a defendant was in possession at the time the suit was brought. *Houghton v. Pierce, 723.*

PERJURY.

1. **Indictment: Pleading City Ordinances.** It is not necessary that an indictment for perjury charged to have been committed in a trial in a police court should set forth *in haec verba* the city ordinances creating the police court and authorizing the appointment of the clerk of the court and giving him authority to administer oaths, etc. A reference to such ordinances by their numbers and general tenor is sufficient. *State v. Dineen, 628.*
2. **Materiality of Testimony: When Question of Law.** When there is no dispute as to what the party charged with perjury testified to upon an issue presented in a court of competent jurisdiction, the materiality of his testimony to the issue presented is purely a question of law for the court to determine. *Ib.*
3. ———: **This Case.** In order to constitute perjury, the evidence charged to be false must have been material to the issue presented at the trial. On the trial, in a police court, of a party charged with disorderly conduct "on Jefferson avenue," defendant's testimony that the disorderly conduct occurred, not on Jefferson avenue, but on a vacant lot some forty feet distant from said avenue, was not material to the issue presented, and, even if false, did not constitute perjury. *Ib.*
4. ———: **Admission of Testimony.** The admission of testimony is not sufficient, in a prosecution for perjury, to prove that such testimony was material to the issue. *Ib.*

PHYSICIAN, SERVICES RENDERED. See Contracts, 9 to 17.

PLEADING.

1. **Defect of Parties: Not Raised by Answer: Taxbill.** It is competent for both the pledgor and pledgee to join in a suit to preserve and enforce the lien of a special taxbill, but if the suit is brought by the pledgor alone, and the defect of parties does not appear on the face of the petition, it can be raised only by answer. *Dickey v. Porter*, 1.
2. **Contract: Alteration: Validity Admitted in Answer: Knowledge.** An admission in the answer made upon a misapprehension of the facts is not admissible in evidence to make out plaintiff's case. An admission of the validity of a contract sued on, without knowledge that it had been altered, does not breathe new life into the contract rendered void by the alteration, and does not constitute an admission of the facts stated in the petition. *Koons v. St. Louis Car Co.*, 227.
3. ———: **Modified by Parol: Pleading.** Parties to a written contract may by a subsequent oral agreement upon a sufficient consideration change or modify it; but plaintiff cannot plead the original contract and recover on the modified contract. In a suit based upon the modified contract, that contract must be distinctly pleaded. It is not competent by general allegations in the petition to blend the provisions of the written and parol contracts as if the suit were based on one written contract. *Ib.*
4. **New Matter: General Denial.** Under the statute, when new matter is relied upon, in defense or in evidence, it must be set up in the answer. A general denial is not sufficient. If defendant intends to rely upon new matter which goes to defeat or avoid plaintiff's action, he must set forth in clear and concise terms each substantial fact intended to be so relied upon. *Kelerher and Little v. Henderson*, 498.
5. ———: ———: **Champertous Contract.** Where plaintiff sues on a contract which contains no allegation in reference to champerty, defendant will not be permitted to interpose the defense of champerty unless he pleads it in his answer. That is "new matter" within the meaning of the Practice Act. *Ib.*
6. ———: ———: ———: **On Face.** The rule that when a contract is offered in evidence and its immorality and illegality appear on its face a recovery will be denied even though the answer is a general denial, does not apply where the client agrees to pay one-half of any and all reasonable expenses or sums of money that may be necessary and proper to insure the successful prosecution of the suit, for such a contract is not champertous on its face. It cannot be said to be an agreement to pay costs of the suit. *Ib.*
7. **Counterclaim: Practice.** Affirmative defenses and counterclaims stand on the same footing that the petition does, and if no evidence is introduced in support thereof, they should be dismissed. *Ib.*
8. **Information: One Count.** An Information which first charges that defendant actually did the shooting, and then charges another party as accessory before the fact, and concludes,

PLEADING.—Continued.

"against the peace and dignity of the State," contains but one count. *State v. Granger*, 586.

9. ———: Abbreviation. An information is not defective merely because it employs the abbreviation "Jno." for the name John. *Ib.*

PLEDGE.

1. **Taxbill: Real Party in Interest.** Where the owner of a taxbill has pledged it as collateral security for the payment of a note of less amount he owes a bank, he still has such an interest in it as entitles him to bring suit thereon to preserve and enforce the lien of the taxbill. Notwithstanding the pledge, the title does not pass to the pledgee, but still remains in the pledgor, subject to the pledgee's lien—just as in the case of a mortgage. *Dickey v. Porter*, 1.
2. ———: ———: **Equity: Code.** The General Assembly, in creating the Code, and in providing for but one form of action, and in providing that that shall be prosecuted in the name of the real party in interest, in substance adopted the equity rule which had theretofore prevailed, that the assignee of an assigned instrument might sue in his own name, he being the real party in interest, and that the pledgor of a pledged instrument being one of the real parties in interest (and being especially interested, for instance, in preserving and enforcing the lien of the pledged special taxbill), should at least be one of the parties plaintiff. *Ib.*
3. ———: ———: **Defect of Parties: Not Raised by Answer.** It is competent for both the pledgor and pledgee to join in a suit to preserve and enforce the lien of a special taxbill, but if the suit is brought by the pledgor alone, and the defect of parties does not appear on the face of the petition, it can be raised only by answer. *Ib.*
4. ———: ———: **Payment.** If between the time the suit is brought by both the pledgor and pledgee and the trial, the debt, to secure which the pledged special taxbill was held by the pledgee as collateral security, is paid, the pledgee is no longer a necessary party to an action to enforce the lien of the special taxbill, or to recover a judgment thereon if the lien has expired, and if the attention of the court is called to that fact the name of the pledgee should be stricken out. *Ib.*
5. ———: ———: **Pledgee Alone: Trustee.** The pledgee of a lien (for instance, a special taxbill) may bring suit in his own name to enforce the lien, but the extent of his recovery for himself will be the amount of the debt the pledgor owes him, and he will be a trustee for the pledgor for the overplus. But that does not mean that the pledgor, where he is the real party in interest, may not also bring the suit either alone, or by joining with the pledgee as plaintiff. *Ib.*
6. ———: **Payment to Wrong Party.** Under the charter of Kansas City, the owners of abutting property against which a special taxbill has been issued in payment of a sewer, can avoid all danger of paying the amount of the taxbill to the wrong party by paying it to the city treasurer. *Ib.*

POLICE REGULATION.

1. **Public Health: Milk: Constitutional Ordinance.** A city ordinance which imposes a fine on any person who sells or exposes for sale "milk containing less than three per cent by weight of butter-fat, and 8.5 per cent of solids not fat, and seven-tenths of one per cent ash, of which fifty per cent is insoluble in hot water," does not violate any of the constitutional rights of the citizen. *St. Louis v. Langeland*, 225.
2. **Public Safety: Automobile Act.** The Automobile Act of 1903 is a police regulation, and its enactment was clearly within the power of the Legislature. *State v. Swagerty*, 517.

PRACTICE.

1. **Prohibition: Change of Venue: Error.** If the application for a change of venue is not in conformity to the statutory requirements, or if the proper notice that an application for a change would be made was not given, then error in granting the change of venue may be corrected by an appeal. The court having jurisdiction to grant the change of venue, the Supreme Court will not by writ of prohibition prohibit it from exercising that jurisdiction, however erroneous its action may be. It is not the purpose of the writ of prohibition to correct errors of the trial court. *State ex rel. v. Riley*, 175.
2. **Refusing Correct Instructions.** Where the instructions given fully and fairly cover every issue in the case, a refusal of correct instructions asked by defendant, is not error. *State v. Paulsgrove*, 193.
3. **Bill of Exceptions: Expiration of Time: Extension Thereafter.** An order extending the time for filing bill of exceptions, made after the expiration of the time originally granted, is void; and in such case there is nothing for the appellate court to review except the record proper. *State v. Cutberth*, 579.
4. ———: ———: ———. When the time granted for filing the bill of exceptions has expired, neither the judge in vacation nor the court at a subsequent term has power to extend the time. And a bill of exceptions filed in pursuance of such void order will not be considered on appeal. *State v. Granger*, 586.
5. ———: Amendment: By Consent: New Trial: *Nunc Pro Tunc* Entry. When a bill of exceptions is filed, it becomes a part of the record of the court, and can only be changed or amended by a *nunc pro tunc* entry correcting the record. It cannot be amended by consent of defendant's counsel, the prosecuting attorney, and the judge who tried the case, so as to show an exception saved to the overruling of the motion for new trial; nor is the suggestion of the trial judge that it is usually understood that an exception is taken when a motion for new trial is overruled, sufficient ground for a *nunc pro tunc* entry correcting the record. *State v. Libby*, 596.
6. **Appeals: Improper Examination: General Assignment.** An assignment that the court erred in permitting the prosecuting attorney to ask immaterial, impertinent and insolent questions,

PRACTICE.—Continued.

is too general to call for consideration by the appellate court. *State v. Howard*, 600.

7. **Change of Venue: Application Properly Overruled.** When the case was called for trial, the State announced ready, but defendant asked for time in which to prepare an application for a continuance, which was granted. While waiting for the supposed application for a continuance, the court learned that defendant was preparing an application for a change of venue, whereupon the court called the case for trial, and so notified the defendant, who, after the jury were sworn upon their *voir dire* and the State had finished its examination of the jurors, filed his application for a change of venue. *Held*, that the application was properly overruled. *State v. Davis*, 616.
8. **Perjury: Materiality of Testimony: When Question of Law.** When there is no dispute as to what the party charged with perjury testified to upon an issue presented in a court of competent jurisdiction, the materiality of his testimony to the issue presented is purely a question of law for the court to determine. *State v. Dineen*, 628.
9. **Notes of Testimony: Taken by Defendant on Habeas Corpus: Compelling Delivery.** It was error for the court to compel defendant's counsel to deliver to the prosecuting attorney for his inspection stenographer's notes of the testimony taken by defendant in a habeas corpus proceeding before the probate judge for the purpose of securing bail for defendant. *State v. Barnett and Baker*, 640.
10. **Instructions: Defendants Jointly Indicted and Tried: General Objection.** Where defendants are jointly indicted and tried, an objection to the instructions given as not being all the law of the case is not sufficient to convict the court of error in failing to instruct that the jury might find one or both of the defendants guilty, or acquit one or both. Defendants should have requested such an instruction, or called the court's attention to its failure to instruct upon this particular feature of the case. *Ib.*
11. **Bill of Exceptions: Expiration of Time: Extension Thereafter: Judge Absent.** The authority of a judge to sign a bill of exceptions in vacation and make it a part of the record, is purely statutory in this State. After the expiration of the time granted within which to file a bill of exceptions, neither the court nor the judge in vacation can extend it, and a bill of exceptions filed in pursuance of such a void order will not be considered on appeal. And this is true, notwithstanding the judge is absent from the State when the bill of exceptions is delivered at his chambers within the time allowed. *State v. Paul*, 681.

PRINCIPAL AND AGENT.

Malicious Prosecution: Defendants' Connection Therewith: Demurrer to Evidence. Plaintiff was prosecuted for arson, and the case after a mistrial was voluntarily dismissed, and he sued the seven insurance companies which carried insurance on the goods burned, for having instigated the prosecution, and at the trial they asked for a peremptory instruction on the ground that the evidence did not show that they instigated or carried

PRINCIPAL AND AGENT.—Continued.

on the prosecution. The prosecuting attorney testified that he was not employed or requested by the defendants or their agents to file the affidavit; that the affidavit was made by one Musgrove, and that he filed the affidavit and information honestly believing plaintiff started the fire and that the evidence Musgrove gave him was sufficient to convict, and that he so stated at the time. The evidence further shows that the prosecuting attorney received his impressions and formed his conclusions of plaintiff's guilt from statements made to him by Musgrove and other witnesses secured by him; that before he filed the information, Musgrove had consulted an attorney and besought his assistance in the prosecution; that the affidavit was drawn by this attorney, and signed by Musgrove, at the attorney's request; that this attorney assisted in the prosecution from the commencement of the case until its dismissal, and that he was paid for his services by the accredited agents of defendants; that, while Musgrove denied that he was acting as the agent of the defendants in seeking evidence and urging the prosecution against plaintiff, they accepted those services and acted upon his advice and employed the attorney to prosecute plaintiff on the charge of arson; that the only parties interested in the prosecution were the defendants, who were seeking to avoid their policies on the goods burned; that a few days after the fire and before Musgrove became so active in his search for incriminating testimony against plaintiff, one Welch, an adjuster for all the defendants except one, was in the city of the fire, sent for plaintiff and his brother who owned the stock of goods, and assumed to represent defendants as adjuster and examined them as to the amount of the loss, and in the presence of a witness in the office of the local agent expressed the opinion that plaintiff had burned the store, and that he would send the United States marshal to arrest him, and that plaintiff ought to be in the penitentiary. *Held*, first, that defendants are estopped from denying that Musgrove was their agent; *second*, that the evidence was ample to show the connection of defendants with the instigation and carrying forward of the prosecution. *Carp v. Insurance Co.*, 295.

PRISONER, PAROLE. See *Parole*.

PROBATE COURT.

Sale of Minor's Land: Re-investment: Statute. Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and every thing whatsoever with the minor's estate, simply because he is a minor. The act to be valid must be based on some equitable principle. If the jurisdiction to sell the lands of infants for the mere purpose of investing in other property ever existed in chancery, there is no necessity for its exercise in Missouri, because for more than forty years power to do that is given by statute, under safeguards in the statute prescribed, and is now vested in the probate court. *Heady v. Crouse*, 100.

PROFESSIONAL SERVICES. See *Contracts*, 9 to 17.

PROHIBITION.

Change of Venue: Error. If the application for a change of venue is not in conformity to the statutory requirements, or if the proper notice that an application for a change would be made was not given, then error in granting the change of venue may be corrected by an appeal. The court having jurisdiction to grant the change of venue, the Supreme Court will not by writ of prohibition prohibit it from exercising that jurisdiction, however erroneous its action may be. It is not the purpose of the writ of prohibition to correct errors of the trial court. *State ex rel. v. Riley*, 175.

PUBLIC HEALTH.

Milk: Constitutional Ordinance. A city ordinance which imposes a fine on any person who sells or exposes for sale "milk containing less than three per cent by weight of butter-fat, and 8.5 per cent of solids not fat, and seven-tenths of one per cent ash, of which fifty per cent is insoluble in hot water," does not violate any of the constitutional rights of the citizen. *St. Louis v. Langeland*, 225.

PUBLIC POLICY.

Torts of Lessee: Liability of Lessor. The very highest policy of a State is its statutory law. But the question of the liability of the lessor for the torts of the lessee is not to be determined by public policy. It is not a question of public policy, but of legislative intention—of statutory construction. *Moorshead v. United Railways Co.*, 121.

PUBLIC SAFETY.

Automobile Act: Police Power. The Automobile Act of 1903 is a police regulation, and its enactment was clearly within the power of the Legislature. *State v. Swagerty*, 517.

RAPE.

Deaf Mute. The taking of a deaf and dumb girl, seventeen years old, in intelligence and playful conduct like a child less than eleven years of age, to a hotel, and there registering her as the wife of defendant, and having her assigned to the same room and bed with defendant, and deflowering her during the night, is rape. *State v. Smith*, 695.

RATIFICATION.

Sale of Minor's Lands: Deeds to Other Lands. Where the decree of the court made without jurisdiction created a lien on the land of the commissioner (their father) in favor of the minors whose real estate he was authorized to sell, to secure them in the purchase money, and he in after years divided all the land owned by him among them, giving them deeds of gift therefor, the acceptance of those deeds by the children will not be held to be a ratification of the sale of their lands, there being nothing in the deeds to indicate that they were given to compensate them for their interest in the lands sold by him. *Heady v. Crouse*, 100.

REGISTRATION OF VOTERS. See Elections.

REMARKS OF COUNSEL. See Attorneys.

REPUTATION.

Based on Witness's Opinion. The general reputation of a witness cannot be based on another witness's transactions with him; and an answer that the general reputation of a witness is bad, based on the dealings of the witness with him, should be stricken out. *Carp v. Insurance Co.*, 295.

RESPONSIVE PLEADINGS.

1. **Suit on Contract: Recovery on Another.** Where plaintiff sues on a special contract he must recover on that contract or not at all. Plaintiff alleged that defendant employed him to do certain painting at certain prices, he to furnish all the materials, and that he agreed to take all the materials defendant had on hand at the time he began the work at their reasonable market value, and defendant agreed to take back at their reasonable market value all the materials he had on hand at the time his employment ceased, and the petition is silent as to whether the contract was written or oral, but to prove his case he offered in evidence a written contract which contained no reference to the purchase of materials either at the beginning or completion of the work. *Held*, that, having elected to stand on the written contract, he cannot recover on a contract, part of which was written and part oral. *Koons v. St. Louis Car Co.*, 227.
2. ———: **Quantum Meruit.** A suit which is clearly one on contract, as shown by both the petition and evidence, cannot be considered one of *quantum meruit*. *Ib.*

RESULTING TRUSTS. See Trusts and Trustees.

ROADS AND HIGHWAYS.

1. **Automobiles: Rights on Highway.** Automobiles, operated and propelled in a manner not incompatible with the safety of the travelling public, have equal rights with other vehicles upon the public highways, subject to such rules and regulations as are prescribed by law. *State v. Swagerty*, 517.
2. **Automobile Act: Police Power.** The Automobile Act of 1903 is a police regulation, and its enactment was clearly within the power of the Legislature. *Ib.*
3. ———: **Independent Sections: Speed.** In a prosecution for a violation of section 2 of the Automobile Act of 1903, prohibiting the running of automobiles at a greater rate of speed than nine miles per hour, the validity of section 4 of said act, requiring operators of automobiles to obtain licenses, is not involved. *Ib.*
4. ———: **Speed Limit: Reasonableness.** The courts have nothing to do with the reasonableness or unreasonableness of an act of the Legislature which it was within its power to enact, and this court will not declare that a speed limit of nine miles per hour for automobiles is unreasonable. *Ib.*

ROBBERY.

1. **Information: Time.** Time is not the essence of the offense of robbery. And an information charging this offense is not de-

ROBBERY.—Continued.

fective because it fails to specify the particular day of the month on which the alleged robbery was committed. *State v. Moore*, 624.

2. ———: **Venue.** Where an information correctly lays the venue in the margin, it is not invalid because the venue is not stated in the body of the information. *Ib.*
3. ———: **Fear of Injury: Nature of Instrument.** An information charging robbery is not invalid because it does not specify the nature of the instrument or the means by which the prosecuting witness was put in fear of immediate injury to his person. *Ib.*

SALES.

Public Health: Milk: Constitutional Ordinance. A city ordinance which imposes a fine on any person who sells or exposes for sale "milk containing less than three per cent by weight of butter-fat, and 8.5 per cent of solids not fat, and seven-tenths of one per cent ash, of which fifty per cent is insoluble in hot water," does not violate any of the constitutional rights of the citizen. *St. Louis v. Langeland*, 225.

SELF-DEFENSE.

1. **Instruction: Requested by Defendant.** Where, as in this case, the court has already fully instructed on the law of self-defense, there is no error in refusing an instruction, requested by defendant, embodying the same proposition. *State v. King*, 560.
2. ———: **Evidence.** Under the facts as detailed by defendant himself, and by the State's witness, there was no call for an instruction on self-defense. *Ib.*

SERVICES RENDERED BY PHYSICIAN. See *Contracts*, 9 to 17.

SEWER.

1. **Taxbill: Thickness of Pipe: Specifications in Ordinance.** Where the ordinance provided that the work should conform to the plans and specifications then on file in the office of the board of public works, those plans and specifications were as much a part of the ordinance as if they had been set forth therein in detail; and as the ordinance itself provided that all sewers of twenty-one inches or less in interior diameter should be constructed of vitrified clay pipe, and all sewers two feet or more in interior diameter should be constructed of hard burned brick laid in hydraulic cement mortar, and as the specifications and contract on file with the board specifically described the thickness of the pipes, it is obvious the dimensions of the sewer pipe were not left to the discretion of the city engineer, and the taxbills are not therefore void. And especially should this be the holding where neither the answer nor the instructions made the point that the thickness of the sewer pipe was not sufficiently designated, and defendants contented themselves to raising that point only by an objection to the introduction of the ordinance in evidence. *Dickey v. Porter*, 1.
2. ———: **Sewer: Masonry.** Where it is impossible, on account of the hills and character of clay, etc., to definitely state the amount of rubble masonry that will be required for carrying the sewers, and for courts and side protections, the taxbills

SEWER.—Continued.

are not void because of a failure of the ordinance to prescribe the length and quality of masonry required. If the quantity exceeds the estimates, the most the property-owners can demand is a credit on the taxbills for the excess; but if the amount is in substantial compliance with the contract, ordinance and charter, not even that credit should be allowed. *Dickey v. Porter*, 1.

STATUTE OF FRAUDS.

Resulting Trusts: Evidence. Implied trusts, whether they be such as are designated in the books as resulting trusts or those called constructive trusts, are taken out of the provisions of the Statute of Frauds. The proof of the existence of such trusts rests in parol. *Bunel and Heffernan v. Nester*, 429.

STATUTES AND STATUTORY CONSTRUCTION.

1. **Time of Taking Effect: Revision Session: Lease.** A statute with an emergency clause, approved June 19, 1899, authorizing one street railway company to lease all its properties to another, went into effect at once, although it was printed in the Revised Statutes of 1899 as a new section. *Moorshead v. United Railways Co.*, 121.
2. **Lease: Companies Already Organized.** The act of June 19, 1899, by section 15 conferred on any existing street railway company which filed with the Secretary of State its acceptance of the act and paid the required fees, the power to lease its properties. *Ib.*
3. ———: ———: **Acceptance Shown.** Where plaintiff seeks to hold liable for her tortious injuries the street railway company which has leased its properties to another company, and for the purpose of fastening liability upon it introduces the lease in evidence, the burden is not on the company to show that it has filed with the Secretary of State its acceptance of the provisions of the act authorizing it to make the lease. In such case, in the absence of proof to the contrary, the presumption is that both companies have complied with the provisions of the statute. *Ib.*
4. **Parole of Prisoner: After Appeal and Affirmance of Judgment: Repeal by Implication: Appeal Pending.** Section 2827, Revised Statutes 1899, providing that no parole shall be granted in any case while an appeal is pending, did not by implication confer power on the circuit court to grant a parole after affirmance of the judgment, when the appeal is no longer pending. That provision did not, by implication, repeal the provisions of section 2705 which expressly requires the Supreme Court, when a judgment is affirmed, to direct that the judgment of the trial court be executed. *Ex parte Foister*, 687.

STATUTES CITED AND CONSTRUED.**Revised Statutes 1899.**

Section 539, see page 24.	1102, see pages 477, 478,
540, see page 24.	479.
604, see page 511.	1186, see page 165.
728, see page 686.	1187, see pages 151, 157,
818, see pages 184, 185.	167.
864, see page 34.	1838, see page 548.
'021 and '0901	1994, see page 591.

- 2009, see page 687.
2114, see page 574.
2194, see page 584.
2527, see page 626.
2535, see page 626.
2705, see pages 690, 691,
692, 693, 694.
2706, see pages 690, 691,
692.
2718, see pages 691, 692,
693, 694.
2817, see pages 691, 693.
2827, see pages 690, 691,
694.
2864, see page 387.
3135, see page 331.
3417, see page 461.
3510, see pages 109, 116.
3511, see page 109.
3529, see page 442.
3620, see pages 490, 492,
495.
4160, see page 168.
4499, see page 516.
4652, see pages 470, 472,
473, 474.
4656, see page 473.
Art. 3, ch. 122, see page
181.
Art. 14, ch. 16, see page
690.

Revised Statutes 1889.

Section 8922, see page 473.

Revised Statutes 1879.

Section 790, see page 170.

806, see page 479.

2693, see page 495.

2694, see page 495.

General Statutes 1865.

Section 34, p. 470, see page 109.

35, p. 470, see page 109.

Laws 1903.

p. 155, see page 613.

p. 162, see page 522.

Laws 1901.

p. 107, see page 278.

Laws 1881.

p. 79, see page 479.

Laws 1860-1.

p. 98, see page 116.

Laws 1825.

Vol 1, p. 403, see page 461.

STREET RAILWAY CORPORATIONS. See Lease.

TOLL BRIDGE. See Negligence, 2 and 3.

TORTS.

1. **Liability of Lessor.** Where the statute gives a street railway company express power to lease all of its properties to another street railway company, as the statute of this State does, the lessor is not liable in damages for injuries to a passenger resulting from the negligence of the lessee, unless such liability is expressly reserved in the statute. [Distinguishing *Markey v. Railroad*, 185 Mo. 348.] *Moorshead v. United Railways Co.*, 121.
2. ———: **Statute.** When the lease of the franchises and railways of one street railway company to another is authorized by statute, the leasing company remains liable to third persons for the torts of the lessee, if the statute so says; and where the lease is not authorized by statute the lease does not relieve the lessor of its public duties and responsibilities, but the lessor remains liable for the torts of the lessee. But where the statute does authorize the lease, without any reservation in the act of liability on the part of the lessor to third parties, for the torts of the lessee, the lessor is not liable for those torts. And where the statute expressly authorizes one street railway company "to sell, lease or dispose of by any other lawful contract, to any other street railway company, its railroad rights, franchises, including the right to be a corporation, and all and singular its other properties of every character, and description," the lessor is not liable for the lessee's negligent injury of a passenger in the operation of a street car, and the General Assembly did not intend that it should be. The right to dispose of its corporate franchise being given to the grantor, it necessarily follows that it was not to be held liable for the torts of the grantee; and that conclusion is inevitable where the lessor is given the right to dispose of all its properties. *Ib.*
3. ———: **Lease: To Irresponsible Company.** The mischief which it is supposed by some courts that would result if leasing railway companies are not held responsible for the torts of the lessee, namely, that leases to irresponsible companies would be made for the purpose of evading liability, is met in this State by two answers: first; if that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible; and, second, our statutes require one-half of the capital stock of a street railway company to be subscribed and ten per cent of the subscription to be paid up in cash, and to that extent, at least, the lessees would have to start with assets. *Ib.*

TRANSIT COMPANY. See **Lease.**

TRUSTS AND TRUSTEES.

1. **Resulting Trusts: Statute of Frauds: Evidence.** Implied trusts, whether they be such as are designated in the books as resulting trusts or those called constructive trusts, are taken out of the provisions of the Statute of Frauds. The proof of the existence of such trusts rests in parol. *Bunel and Heffernan v. Nester*, 429.
2. ———: **Curator: Deed of Trust: Taking Title in Himself: Speculation on Ward's Money: Recital in Trustee's Deed.** A senior deed of trust on two pieces of property secured a loan thereon made by Mills and one made by the curator out of his ward's funds; a junior deed of trust on the same property secured the curator's individual loan as well as one made by him for

TRUSTS AND TRUSTEES.—Continued.

his ward. *Held*, that there was no principle of natural equity or written law that denied to the curator the privilege of bidding at the foreclosure sale in his own right, to protect himself as well as the ward and Mills. If he bid more than the ward's debt, and treated the purchase as his own and accounted to the ward for her loan, by charging himself in gross for all money coming into his hands originally as the curator of her estate, and there is absent any increment of gain to him by way of speculation on his ward's money in the purchase of the property, a narrative in the trustee's deed to him that he paid the purchase price is presumptively true, and he did not take the property in trust for the ward. And this conclusion is fortified by the fact that in his final settlement the curator treats the loans made out of his ward's estate as if paid to him and as left in the corpus of the trust estate. *Ib.*

3. ———: **Proof: Statement by Curator.** Disconnected parts of poorly remembered conversations between the deceased curator and the debtor whereby the curator is made to say on the date of the trustee's sale of the mortgaged property that he was bidding for his ward, are not sufficient to show that he took title for his ward—the rule being that where plaintiff relies for title on raising an implied trust, the proof should be so clear, unequivocal, cogent and impelling as to exclude every reasonable doubt from the chancellor's mind. *Ib.*
4. ———: ———: **This Case.** Giving force to the rule as to the character of proof required to establish an implied trust in property, and attending to the fact that both the trustee who sold the mortgaged property to the curator and the curator are dead, that the curator was solvent and possessed of large means and handled large sums, that the transaction in question was never questioned in his lifetime, that he treated the property purchased at the trustee's sale as his own and specifically disposed of it by will, and that the property was not specifically described in the ward's deed to plaintiffs, while other parcels of real estate were so described therein, it should be held that the proof was not sufficient to show that the curator bought the property at the trustee's sale for his ward. *Ib.*
5. ———: **Ward's Estate: Interest.** Under some circumstances interest should be charged to the curator on the money of his ward. But where the suit is to have a trust declared in her favor in property sold to him under a deed of trust given in part to secure a loan of her money and in part to secure a loan of his, and no claim is made that accrued interest was used towards paying a part of the purchase price, the pleadings are not in shape to authorize a consideration of the question. *Ib.*
6. **Possession by Trustee: Adverse to Beneficiary: Limitation.** Where a trustee, to whom has been conveyed land for the sole use and benefit of another, enters into possession without other title than that conferred by the trust deed, the presumption is that he took possession as trustee by virtue of the deed, and not adversely to the beneficiary. Thereafter his possession could become adverse to the beneficiary, or after her death to her heirs, only by some unequivocal act or acts brought home to her knowledge, or after her death to their knowledge, showing that he claimed the title in opposition to her or their title, or such an occupancy or user so open, noto-

TRUSTS AND TRUSTEES.—Continued.

rious, and inconsistent with their rights that the law will authorize from such acts the presumption of such knowledge by them. *Houghton v. Pierce*, 723.

7. ———: **By Trustee's Wife Under Deed of Trust: Mortgagee in Possession.** The owner of the land in 1865 conveyed it in trust for the sole use of the owner's wife, and the trustee at once entered into possession. The trust deed was made subject to a prior deed of trust to secure a note for \$300, which was assigned by the payees by indorsement in blank, and this note was in possession of defendant, the trustee's wife, but the evidence does not show how or when she came into possession of it. The beneficiary of the trust deed died in 1872, and the trustee in 1899, and the trustee's wife claims title as assignee of the note and by adverse possession, but there is no evidence that she claimed possession adversely to her husband. *Held*, first, that possession by her cannot be considered adverse to her husband or to the beneficiary, without the most unequivocal assertion of claim of a separate estate hostile to both and brought home to their knowledge; *second*, as her husband, the trustee, took possession under the trust deed, the presumption is that her acts in receipting for the rents and paying the taxes were done in subordination to his legal title and right of possession, at least up to the time of his death in 1899; and, *third*, assuming (what is not shown) that the trustee's wife took the note indorsed in blank in good faith, for value, before maturity and without notice, and that the indorsement was proved, the presumption is that the rents which the trustee permitted her to receive were so received and applied by her to pay off the note, it being the duty of the trustee to protect the beneficiary's estate and pay off the prior lien out of the rents and profits. *Ib.*

UNITED RAILWAYS COMPANY. See *Lease*.

USURY.

- Taxbill: Usurious Contract: New Defense.** A defense to the special taxbill not raised in the trial court will not be considered on appeal. Whether or not the contract between plaintiff and the contractor, by which plaintiff advanced to the contractor money to carry on the work, was usurious, will not be considered on appeal, if that defense to the taxbill was not made in the trial court. *Dickey v. Porter*, 1.

VENUE. See *Change of Venue*.

VERDICT.

1. **Excessive: Malicious Prosecution.** The amount of damages in a civil suit for malicious prosecution is largely a question for the jury and their verdict should not be held by the appellate court to be excessive unless the court can say it was the result of prejudice, passion or malice. *Carp v. Insurance Co.*, 295.
2. ———: **\$10,000.** Plaintiff, as a result of her injuries, is paralyzed from her hips down, her limbs are becoming atrophied, her bowels refuse to perform their normal functions in the natural way, nor from sensation can she tell when she should look after them in that regard; she is sleepless, nervous, and suffers from headache, and her condition is

VERDICT.—Continued.

growing worse. *Held*, that it cannot be seen how, if the jury believed her evidence to this effect, their verdict for \$10,000 could have been less. *Sotabier v. Transit Co.*, 702.

WILLS.

1. **To Jane and Heirs of Her Body: Child's Death Leaving Children.** Where by will land was devised to Jane and the heirs of her body, and children were born to Jane, and afterwards the land was sold in pursuance to a decree of court brought by Jane and her husband against the children, and afterwards the children died before Jane, leaving children of their own born after the decree, the decree and the sale of the land thereunder did not affect the title of the grandchildren. Jane's children, who died before she did were not her heirs; until her death their interests were contingent, and as they died first no title ever vested in them. The interests that would have gone to her children had they survived Jane, at her death became vested in the descendants of such deceased children, and hence the sale did not affect those descendants. *Heady v. Crouse*, 100.
2. **Charity.** Gifts to charitable uses receive favorable consideration in the courts of this State. *Hadley v. Forsee*, 418.
3. ———: **Public.** Uncertainty as to the individual to whom the benefit may reach does not defeat the gift, but on the contrary is one of the features that distinguish a public from a private charity. But it is not every general intent that appears in a will that can be put into effect by a court of chancery. *Ib.*
4. ———: ———: ———: **Cause of Religion: No Specific Beneficiary.** Though a general intent to advance the cause of religion and promote the cause of charity appear in the will, yet in the absence of any provision showing how that purpose is to be put into effect, the court is powerless, and the testator will be held to have died intestate as to the property or fund. If he does not designate the particular religion or the particular charity he had in mind, the court will not make a will for him by assuming to designate the church or charity he had in mind. *Ib.*
5. ———: ———: **This Will: Uncertainty.** The will gave all testator's property to his wife for life, "subject to the following conditions: The balance of my said property will be given to advance the cause of religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes." *Held*, that the testator gave the courts to understand that he had confided to his wife his purpose as to the particular church or charity he had in mind, and she being dead there is no such trust for a charitable or religious use created in the will as a court of chancery can enforce. *Ib.*

WITNESSES.

1. **Party to Contract: Other Party Dead.** The statute (sec. 4652, R. S. 1899) is an enabling, not a disqualifying, act. It does not disqualify any person to testify because of his interest in the contract, whether the other be dead or not. It disqualifies the surviving party only when one of the original parties to the contract is dead, and it does that because the

WITNESSES.—Continued.

other party is dead. But where one of them has died, his assignee of the claim sued on may testify as to what occurred in regard to the contract after his death, and the other party may contradict that testimony and may give his own explanation of such post-mortem occurrences. [Overruling *Curd v. Brown*, 148 Mo. 95.] *Weiermueller v. Scullin*, 466.

2. ———: ———: **Subsequent Transactions.** The statute does not exclude the living party from testifying where his evidence relates to transactions and conversations had with others to which the deceased was not a party and with which he had no connection. Where the suit is based on conversations had by decedent's assignee with defendant and admissions and promises by him, after decedent's death, defendant, the surviving party, may deny such admissions and explain the transaction, even though the claim grows out of a supposed debt due decedent and assigned to plaintiff. *Ib.*
3. ———: ———: **Where Administrator is Party.** Where the administrator is a party to the action, the surviving party is disqualified to testify for any purpose until after the will is probated or the administrator is appointed; and much of the confusion attending the statute is due to a failure to observe this arbitrary distinction which it makes. *Ib.*
4. **Defendant as Witness: Character: Impeachment.** When a defendant offers himself as a witness, he is subject to impeachment in the same manner as any other witness, and for that purpose the State may attack his general reputation for morality. *State v. Barnett and Baker*, 640.
5. **Deaf Mute.** A deaf and dumb girl, the prosecutrix in a trial of defendant for rape, is a competent witness for the State. *State v. Smith*, 695.
6. **Expert: Bias.** The assistant superintendent of the Deaf and Dumb Institute where prosecutrix was educated, is peculiarly fitted to communicate with her by signs and to interpret her testimony to the jury; and whether or not he was unduly biased in her favor is a matter for the determination of the trial court, and if there is no ground for charging the court with a lack of proper discretion in the matter, the verdict will not be interfered with on that assignment. *Ib.*

Rules for the Government of the Supreme Court of Missouri.

Adopted at the April Term, 1891.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motions to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Diminution of record, suggestion after joinder in error.

RULE 4. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 5. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Reviewing instructions.

RULE 6. For the purpose of reviewing the action of the trial court, in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form avoiding repetition and omitting all immaterial matter.

Bill of exceptions in equity cases.

RULE 7. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence may be reduced to a narrative form where this can be done and at the same time preserve full force and effect of the evidence.

Presumption in support of bill of exceptions.

RULE 8. The only purpose of a statement, in a bill of exceptions, that it set out all the evidence in the cause, being that the Supreme Court may have before it the same matter which was decided by the

SUPREME COURT RULES.

court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Making up transcripts.

RULE 9. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (*e. g.*): "Summons issued October 2, 1891, executed October 5, 1891," and, if any pleading be amended, the clerk, in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading or part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Words appellant and respondent, what they include.

RULE 10. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff and defendant in error and other parties occupying like positions in a cause.

Abstracts in lieu of transcript, when filed and served.

RULE 11. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in the court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file ten copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time. (As amended February 26, 1895.)

Abstracts, when filed and served.

RULE 12. In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file ten copies

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thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Abstracts, what they shall contain.

RULE 13. The abstracts mentioned in rules 11 and 12 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings, or as to the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Printed transcripts.

RULE 14. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed and indexed, uncertified copies of the entire record, filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with said rule and dispense with the necessity of any further abstracts.

Briefs, what to contain and when served.

RULE 15. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last-named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last-named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct.

In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case

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cited from any report of the adjudged cases, as well as the number of the volume and the pages where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, section, paging or side paging shall be set forth.

Failure to comply with rules 11, 12, 13 and 15.

RULE 16. If any appellant in any civil case shall fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of the respondent continue the cause at the cost of the party in default.

Costs, when allowed for printing abstracts and records.

RULE 17. Costs will not be allowed either party for any abstract, filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order, or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

In any case in which a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

Service of abstracts and briefs.

RULE 18. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Service of abstracts and briefs in criminal cases.

RULE 19. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of the Supreme Court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the Attorney-General, and, thereupon the Attorney-General shall, fifteen days before the day of

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trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeal as poor persons, by the circuit court, counsel will be permitted to file type-written briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Taking record from clerk's office.

RULE 20. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court; provided any enrolled attorney may withdraw the record in any cause in which he is counsel for the purpose of having the same printed in full by filing with the clerk of this court the written consent of the adverse party or his attorney and also a receipt, agreeing to return such record within the time to be named therein.

Motions for rehearing.

RULE 21. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, either in division or *in banc*, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Extension of Time.

RULE 22. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Notice to adverse party.

RULE 23. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours

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before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

RULE 24. A motion to transfer a cause under the provisions of the constitution from either division to court *in banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Return of original writs.

RULE 25. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the court *in banc* as such division or judge in vacation may order.

Assignment of motions in civil causes.

RULE 26. All motions and matters in civil cases which have not been assigned by the court *in banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the court *in banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Assignment of criminal causes.

RULE 27. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

When appeal is returnable; certificate of judgment; transcript.

RULE 28. In all cases where appeals shall be taken or writs of error sued out to this court after January 1, 1902, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said sections provided, and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason can not or does not file a complete transcript, he shall file within the time allowed by said section of the statutes a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899. (Adopted at October sitting, 1901.)

RULE 29. All rules not included in the foregoing enumeration are hereby rescinded.



